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No. 15665

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN A. MERZ and CHARLES L. BRAY, doing business as All-Jersey Dairy,

Appellants,

vs.

SUNNYBROOK FARMS MILK AND ICE CREAM CO., INC., a corporation and POLAR PIE ICE CREAM CORPORATION,

Appellees.

Appeal from the United States District Court for the District of Oregon

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

**STATEMENT OF THE PLEADINGS AND FACTS
DISCLOSING THE BASIS OF JURISDICTION
OF DISTRICT COURT AND THIS COURT**

**Facts and Pleadings Relating to Jurisdiction
of District Court**

The District Court had jurisdiction under Title 28, Section 1332, U.S.C.

This case was commenced by the Plaintiffs who were residents of the State of Washington against the

Defendants which were corporations existing under the laws of the State of Oregon, therefore there is a diversity of citizenship. The amount involved exceeds the sum of \$3,000.00. The pre-trial order (R. I 15) supersedes the pleadings and sets forth the jurisdictional facts (R. I 16).

Facts Relating to Jurisdiction of This Court

This court has jurisdiction to review the judgment under Title 28, Sections 1291 and 1294, U.S.C.

The cause was tried to the court below and upon conclusion thereof a final decision in the form of a judgment against the Plaintiffs and in favor of the Defendants was entered (R. I 45).

STATEMENT OF THE CASE

As indicated by the pre-trial order (R. I 15-33), this is an action for damages for breach of contract for negligence and for fraudulent misrepresentation. Only the matters relating to the alleged breaches of contract are presented upon this appeal.

Plaintiffs were milk distributors in Cowlitz County, Washington (R. I 16, R. II 21, 33). Defendants were milk processors in Portland, Oregon (R. I 16, R. II 209). After a period of dealing for some 11 months whereby Defendants furnished Plaintiffs with their requirements without a contract (R. II 25), the parties entered into a written contract on June 11, 1954, whereby for a term of three years Defendants would furnish Plaintiffs with their requirements and Plaintiffs would

buy all of their requirements from Defendants (R. I 5-8, 17). Defendants also undertook to provide Plaintiffs with milk containers (R. I 8, 17).

Plaintiffs had started their business as All-Jersey Dairy on July 15, 1953 (R. II 21). In so doing they invested or became obligated in the sum of \$14,000 for physical assets (R. II 24), an All-Jersey franchise from the Washington Jersey Cattle Club (R. II 23, 24) and incidentals.

During the period of deliveries to Plaintiffs by Defendants, a county ordinance of Cowlitz County required milk to contain a minimum butterfat of 3.6% (R. II 84). The standards for the State of Washington required 3.25% until August, 1955, when they were raised to 3.5% (R. II 90). Requirements of the State of Oregon were 3.8% until November 6, 1954, when Oregon's Milk Control Act was repealed and thereafter no specified minimum was required (R. II 269). The pricing provisions of the contract between Plaintiffs and Defendants were based upon 3.8% butterfat content (R. II 29).

After the contract was entered into, Plaintiffs commenced to receive complaints from the Cowlitz County milk authorities concerning low butterfat content and impurities in the milk (R. II 44, 86; Pl. Ex. 6-A). The Defendants were advised of these complaints (R. II 45) and acknowledged them (R. II 266). Cowlitz County tests showed butterfat content of 3.9% in September of 1953 (R. II 63; Pl. Ex. 6-D, 16). It declined to 3.6% in March, 1954 (R. II 63; Pl. Ex. 6-D, 16) and by December, 1954, ran as low as 3.3% and 3.4% (R. II 63;

Pl. Ex. 6-D, 16). In January, 1955, tests were running down to 3.0% and 3.1% (R. II 63; Pl. Ex. 6-D, 16). One sample in April, 1955, showed 3.2% (R. II 82-83; Pl. Ex. 6-D, 16). Others later that month showed 3.3% 3.4% and 3.25% (R. II 83-84; Pl. Ex. 6-D, 16). Defendants' own tests in Portland during the same period repeatedly showed less than 3.5% and this was true after August, 1955, when the Washington State requirements were raised to 3.5% (Def. Ex. 13). The cartons in which Defendants furnished milk to Plaintiffs for resale were labeled 3.8% butterfat until the supply was exhausted in April or May of 1955 (R. II 34). Thus, it should be undisputed that during early 1955 the milk in these cartons contained substantially less butterfat than was stated upon the label.

The testing by the Cowlitz County authorities culminated in the arrest and prosecution of Plaintiffs in Cowlitz County on April 28, 1955, for selling milk with a butterfat content less than that required by the county ordinance (R. II 17, 46, 85; Pl. Ex. 15-A). The charge was based upon the April 22, 1955, test of 3.2% butterfat (R. II 82-83). Upon the trial, the charge was dismissed because of the absence of any record of publication and a public hearing in the adoption of the ordinance (R. II 85). This was held to have rendered the ordinance invalid.

Plaintiffs' arrest and prosecution received substantial local publicity by newspaper and radio and came to the attention of Plaintiffs' customers (R. II 49, 171, 204; Pl. Ex. 2, 3, 4). Some of their retail customers noticed a decline in the quality of the milk before and after the

prosecution (R. II 166, 170, 176), and their wholesale customers testified to a definite decline in sales after the arrest (R. II 131, 139-40).

Plaintiffs attempted to continue in business but encountered increasing difficulty and were soon forced out of business entirely (R. II, 21, 128). Their sales which had previously shown a consistently increasing trend dropped off markedly (R. II 50; Pl. Ex. 1, 11). Upon liquidation of the business, Plaintiffs received \$1,200 from Carnation Farms and some accounts receivable of doubtful value (R. II 24). After termination of the business, both Plaintiffs re-entered private employment (R. II 21, 106).

Upon hearing this evidence, the trial court rendered an oral opinion to the effect that Defendants had on occasion furnished milk of less than 3.5% butterfat and that Plaintiffs had sustained a loss of business as a result of the prosecution (R. I 46, 47, 48). The Court concluded that the Defendants were not liable for the results from the prosecution where the ordinance was invalid and held this to be the case even though Defendants knew the authorities intended to prosecute (R. I 47, 48). Accordingly, Plaintiffs were denied recovery.

The Defendants had counterclaimed for certain items, including carton costs, but waived their claims in the course of the trial (R. II 306). In the course of settling the findings, the Defendants, at the suggestion of the trial Judge, asked to be relieved of their waiver (R. II 306) and the judgment for Defendants includes the recovery of some portions of their claims (R. I 45).

This appeal is based upon the ground that the trial Court was in error in its basic conclusion that the prosecution was not the proximate result of specific breaches of contract by the Defendants.

SPECIFICATIONS OF ERROR

I.

The Court erred in finding that Defendants had performed their contract and in failing to find that Defendants had breached their contract by furnishing substandard and misbranded milk.

II.

The Court erred in finding that the prosecution of Plaintiffs and the resultant loss of business was not the proximate result of the breaches of contract by the Defendants and in failing to find to the contrary.

III.

The Court erred in failing to assess Plaintiffs' damages and in denying Plaintiffs' recovery for their damages.

IV.

The Court erred in entering judgment for Defendants on their counterclaims.

POINTS AND AUTHORITIES

Point I

A contract for the furnishing of food products for resale for human consumption includes implied warranties that such products are merchantable and fit for the

purpose intended, and will comply with the legal requirements in effect in the specified area of distribution as to quality, labeling, etc.

AUTHORITIES POINT I

- Haynor Manufacturing Co. vs. Davis, 147 N.C. 267, 61 S.E. 54, 55 (1908).
 Mazetti vs. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).
 Lenz vs. Blake-McFall Co., 44 Or. 569, 573, 76 P. 356 (1904).
 Stonebrink vs. Highland Motors, Inc., et al., 171 Or. 415, 425, 137 P.2d 986 (1943).
 Oregon Revised Statutes, 75.150 (1) (2).
 46 Am. Jur., Sales, p. 541, Sec. 355.

ARGUMENT POINT I

The contract entered into between the parties whereby the Defendants agreed to supply milk to the Plaintiffs for distribution in Cowlitz County, Washington, was one which would carry an implied warranty that the milk so furnished was of merchantable quality and fit for the use and purposes intended.

ORS 75.150: "Implied warranties of quality. Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller that particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

“(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.”

In *Stonebrink vs. Highland Motors, Inc., et al.*, *supra*, that principle is stated as follows:

“Under the sales act a dealer who sells articles which ordinarily are used in but one way impliedly warrants fitness for use in that particular way. . . . This is only a warranty of merchantability.”

The Defendants admitted, their own evidence showed (R. Def. Ex. 13), and the Court found (R. I 46) that the Defendants supplied milk to the Plaintiffs which was below the requirements of an ordinance in Plaintiffs' immediate distribution area (R. II 84) and below the requirements of the State of Washington (R. II 90). This milk was furnished to the Plaintiffs in sealed cartons labeled as milk containing 3.8% butterfat (R. II 34), when in fact the milk in those cartons contained substantially less butterfat (R. II 63).

“Where an article is bought for resale, it has been held that there is a warranty that it can be lawfully sold by the purchaser.” (46 Am. Jur., Sales, p. 541, Sec. 355)

The case of *Haynor Manufacturing Co. vs. Davis*, *supra*, states the same principle in this manner—

“Without reference to any authority in the agent to make an express warranty, the manufacturer, in selling through Guy” (the agent) “warranted against latent defects, that the article is merchantable, and can be lawfully sold by the purchaser, if bought for resale.”

In *Mazetti vs. Armour & Co.*, *supra*, the court said—

“We would be disposed to hold on this question that, where sealed packages are put out, and it is made to appear that the fault, if any, is that of the manufacturer, the product was intended for the use of all of those who handled it in trade as well as those who consumed it. Our holding is that, in absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his good when dispensed in original packages, and that such a warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade.”

The Defendants clearly breached the contract with the Plaintiffs by furnishing to them milk which was below the standards in Plaintiffs' distribution area in that it did not comply with the lawful requirements of Cowlitz County, Washington, and of the State of Washington, and in furnishing milk to the Plaintiffs which was mislabeled.

It is obvious that the Defendants were aware of the purpose to which Plaintiffs were going to put the milk and therefore the Defendants warranted that the product would be fit (*Lenz v. Blake*, *supra*).

The evidence introduced by the Plaintiffs shows clearly that much of the milk received by them from the Defendants was below the requirements of Plaintiffs' immediate distribution area (R. II 63) and below the State of Washington's requirements (R. II 90). Defendants admitted being in business in the State of Washington (R. II 214) and knowing of such requirements (R. II 86).

There is no conflict in the evidence upon these important matters, and the finding of the trial court that Defendants did not breach their contract is clearly erroneous as being contrary to the evidence.

Point II

Where acts or omissions occur in breach of a duty and criminal prosecution of the persons to whom the duty is owed may reasonably be expected to follow, such criminal prosecution, if it occurs, is the proximate result of the breach.

AUTHORITIES POINT II

- Abounader vs. Strahmeyer & Arpe Co., 217 App. Div. 43, 215 N. Y. Supp. 702, affirmed 243 N.Y. 458, 154 N.E. 309 (1926).
 Hopkins vs. Jamrog, Mass. 1931, 179 N.E. 224.
 Friedgood vs. Kline, 123 N. Y. Supp. 247 (1910).
 Lawton Refining Co. vs. Hollister, 86 Okla. 13, 205 P. 506 (1922).
 Segal vs. Horwitz Bros., 32 Ohio App. 1, 167 N.E. 406 (1929).
 Southwest Ice & Dairy Products Co. vs. Faulkenberry, Okla. 1950, 220 P.2d 257, 17 ALR 2d 1373.
 Swain vs. Schieffelin, 134 N.Y. 471, 31 N.E. 1025 (1892).
 Rossano vs. Kaminsky, 134 N. Y. Supp. 895 (1912).

ARGUMENT POINT II

The trial court, although finding that Plaintiffs sustained a loss of business and damages by reason of the criminal prosecution brought against them (R. I 46-48)

found the damages thus sustained were not chargeable against the Defendants.

In *Segal vs. Horwitz Bros.*, *supra*, the facts were that Defendant, knowing certain items of personalty to be stolen, sold and delivered such items to the Plaintiff, who was entirely ignorant that the goods were stolen. Plaintiff was thereafter arrested, indicted and tried for the crime of receiving stolen property, but was acquitted of the charge. Plaintiff sued the Defendant for damages resulting from the aforesaid facts, including attorney's fees and costs incurred in defending the criminal prosecution, loss of time from his business, injury to his character and injury to his business. The case was before the court upon Plaintiff's appeal from a judgment dismissing the Plaintiff's complaint after Defendant's demurrer was sustained. The court reversed the lower court and remanded the case. In answer to Defendant's contention that the damages and expenses of the Plaintiff were not the proximate result of Defendant's sale of stolen goods to the Plaintiff, the court said—

"If goods are sold to an innocent purchaser by one who knows them to be stolen, the vendor must be presumed to intend the natural and logical consequences of his own acts, and in our opinion, the arrest, prosecution, indictment and trial of a vendee in possession of stolen goods under such circumstances are the natural and logical consequence of the sale to such vendee of stolen goods. * * * Adopting the definition of single 'proximate cause' set out in the brief of counsel for Plaintiff in error wherein they quote from *Moge v. Societe de Bienfaisance St. Jean Baptiste*, 167 Mass., 298, 45 N. E., 749, 35 L. R. A., 736, that a direct and proximate cause is the active and efficient cause that sets in motion a

train of events which brings about a result without the intervention of any force started and working actively from a new and independent source, we think the facts in the case at bar fit the definition. The sale of the stolen goods set in motion a train of events. The prosecution by the state was a logical result, and a perfectly natural result. The owner's affidavit or information to the state was but an incident, not an intervening force started and working actively from a new and independent source."

The same basic principle is announced in *Friedgood vs. Kline*, *supra*; that one who sells goods to another for resale and such other is subsequently prosecuted for unlawfully selling the same goods, is liable to the person so prosecuted for damages resulting from the prosecution.

The facts in the *Friedgood* case reveal that the Plaintiff, retailer, bought vinegar from the Defendant, wholesaler, and that such vinegar was allegedly pure. Plaintiff sold the vinegar and subsequently the state brought action against the Plaintiff for violation of the pure food law in selling the vinegar and fined Plaintiff \$100 and \$20 costs. Plaintiff sued the Defendant for damages, including the fine, the costs and attorney's fees, and the court allowed the Plaintiff recovery, saying:

"Defendant, however, was both constructively and actually familiar with the laws of this state, and was well aware of the risk which Plaintiff innocently ran by reason of the false representations made, or implied warranty involved, in the contract of sale. Thus the fine with its attendant expenses, to which Plaintiff innocently became liable, was within Defendant's necessary contemplation."

In *Abounader vs. Strahmeyer & Arpe Co.*, *supra*, Defendant, the manufacturer of canned salad oil, was held liable to the Plaintiff, a wholesaler of the same, for damages sustained by reason of a prosecution by the Department of Farms and Markets wherein Plaintiff was convicted and fined \$350 for selling and exposing for sale goods which were improperly labeled as containing one quarter gallon of salad oil when in fact there was less than one quarter of a gallon of salad oil in each can. Plaintiff sued the Defendant for the fine, attorney's fees incurred in defending against the prosecution and for loss of reputation and business. The court held that the doctrine of implied warranty was applicable and affirmed the lower court's order denying Defendant's motion to dismiss the complaint, and in so holding for the Plaintiff said—

“He would undoubtedly have the right to recover the value of the shortage. That a loss very evidently followed as a direct consequence of reliance on the false labels placed on the cans by Defendant. Had he been obligated to pay penalties or fines, recovery might be had, as that loss would quite obviously flow from the breach complained of. * * * The damages which he may recover, are such as flow directly from a breach of a duty * * *.”

The case of *Rossano vs. Kaminsky*, *supra*, allowed the Plaintiff to recover damages from the Defendant who was a manufacturer of vinegar, after the Plaintiff had bought the vinegar from the Defendant and Plaintiff was subsequently prosecuted for selling the vinegar which was below the standards as set by state law. The decision of the court cited the *Friedgood* case as authority for their holding.

"A manufacturer or processor of food products under modern conditions impliedly warrants his goods when dispensed in original packages or bottles and such warranty is available to all who may be damaged by their use in legitimate channels of trade, including those who purchase them for resale." (Southwest Ice and Dairy Products Company vs. Faulkenberry, *supra*; See also Swain vs. Schieffelin, *supra*; Hopkins vs. Jamrog, *supra*; Lawton Refining Co. vs. Hollister, *supra*.)

From the above authorities, it can be readily observed that when a manufacturer sells goods to another for resale or distribution, the damage sustained by the other by reason of a criminal prosecution brought against him for distributing the goods in violation of lawful requirements, are proximately caused by the manufacturer and the manufacturer is chargeable with liability for such damages.

The trial court held in its opinion (R. I 47) and its findings (R. I 40-43) that the invalidity of the ordinance under which Plaintiffs were prosecuted was fatal to Plaintiffs' case. This is the crux of this appeal. Defendants did not contend they knew in advance of the invalidity of the ordinance. They certainly knew there were other applicable laws in effect and that they were subjecting Plaintiffs to the risk of prosecution under any or all of them. Defendants had been specifically warned in this respect and wilfully persisted in their forbidden practices. The inevitable result, i.e., the prosecution of Plaintiffs promptly followed and under any accepted theory of causation was the proximate result as a matter of law. The real question is whether Defendants are to escape liability for their wrongful acts because the

authorities chose to prosecute under a particular law which then proved to have been technically defective? Plaintiffs submit that neither logic nor justice should permit this to happen. On the contrary, the Segal case referred to above is ample authority for the proposition that the lack of success of the prosecution does not relieve the wrongdoer of liability for the consequences which he was bound to anticipate.

Point III

Difficulty of ascertainment is not a bar to the recovery of damages and if the fact that damages have been sustained is established the court will adopt a method for fixing the amount.

AUTHORITIES POINT III

Blagen vs. Thompson, 23 Or. 239, 254, 31 P. 647 (1892).

Carlson vs. Steiner, 189 Or. 255, 265-266, 220 P.2d 100 (1950).

Krause vs. Bell Potato Chip Co., 149 Or. 388, 394, 39 P.2d 363 (1935).

Palmer vs. Connecticut R. & Lighting Co., 311 U.S. 554, 61 S. Ct. 379, 85 L. Ed. 336.

Mazetti vs. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

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Hopkins vs. Jamrog, Mass. 1931, 179 N.E. 224.
22 Am. Jur., Food, p. 903, Sec. 119.

Restatement of the Law of Contracts, comment, Sec. 331.

ARGUMENT POINT III

The books and records maintained by the Plaintiffs during their business operation as All-Jersey Dairy are not as complete as might be desired. However, they were as complete as might be expected in a small business operation. It can be determined from the books and other evidence that prior to the prosecution Plaintiffs had an active milk distributing business which had expanded following the commencement of business until the prosecution. Afterward there was a definite decline in the business with the ultimate result being that Plaintiffs lost the assets of their business and the earnings derived therefrom.

The fact that it may be inconvenient or difficult to establish the actual amount of damages should not wholly bar recovery.

In the case of *Blagen vs. Thompson*, *supra*, this principle is stated as follows:

“ * * * when it is certain that damages have been caused by a breach of contract and the only uncertainty is as to their amount, there can rarely be good reason for refusing on account of such uncertainty any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain * * *. *The rule that damages which are uncertain or contingent cannot be recovered, does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract but an uncertainty or contingency as to whether such gain or benefit would be derived at all.* It only applies to such damages as are not the certain result of the breach *and not to such as are* ”

the certain result but uncertain in amount. Now, in this case, it is certain, under the facts as he claims them to be, that the plaintiff has sustained some loss as the proximate and natural consequences of the breach of defendants, and under such circumstances the law will adopt that mode of estimating the damages which is most certain and definite, and it seems to us the rule we have suggested most nearly meets the requirements of the law." (Emphasis supplied)

Carlson vs. Steiner, *supra*, and Krause vs. Bell Potato Chip Co., *supra*, affirm the statement of the Blagen case to the effect that when some damages have been sustained as the direct and proximate result of a breach of duty, the law will adopt the mode of estimating the damages which is most certain and definite.

"The requirement of reasonable certainty does not mean that the plaintiff can recover nothing unless he establishes the total amount of his harm; nor does it mean that he cannot get damages unless he proves the exact amount of his harm. The requirement merely excludes those elements of harm that cannot be evaluated with a reasonable degree of certainty. There is usually little difficulty in proving the amount of actual expenditures, even though it may be impossible to prove the amount of expected profits. Furthermore, there are cases in which the experience of mankind is convincing that a substantial pecuniary loss has occurred, while at the same time it is of such a character that the amount in money is incapable of proof. In these cases, the defendant usually has reason to foresee this difficulty of proof and should not be allowed to profit by it. In such cases, it is reasonable to require a lesser degree of certainty as to the amount of loss, leaving a greater degree of discretion to the jury, subject to the usual supervisory power of the court." (Restatement, Law of Contracts, Comment to Section 331.)

Evidence of past profits affords a reasonable basis for the conclusion of future profits (*Palmer vs. Connecticut R. and Lighting Co.*, *supra*).

The fact that damages cannot be calculated with mathematical accuracy or with absolute certainty or exactness or the fact that there is difficulty in the assessment of damages is not a sufficient reason for denying recovery thereof when the right to them is established.

"It is the rule that loss of profits approximately resulting from the wrongful destruction of an established business constitutes an element of damages recoverable for such destruction, and it has been held that where it is apparent that some loss was suffered, it was proper to let the jury determine what the loss probably was from the best evidence the nature of the case admitted." (*Southwest Ice and Dairy Products Company vs. Faulkenberry*, *supra*.)

Hopkins vs. Jamrog, *supra*, states the same rule in this manner:

"The plaintiff's loss of prospective profits if proved was not too remote to be allowed as an element of damages."

"Loss of profits, injury to business reputation and loss of trade are proper elements of damages recoverable by a retailer * * * against the supplier of food upon the implied warranty of fitness where such damages are provable." (22 Am. Jur., Food, p. 903, Sec. 119, see also *Mazetti vs. Armour*, *supra*.)

The Plaintiffs produced their books and records in the trial court (R. II 186). There was sufficient evidence from which the amount of damages could have been determined under the authority cited above. That the Plaintiffs were damaged is undisputed and such dam-

ages were capable of determination with a reasonable degree of certainty from Plaintiffs' testimony and from the books and records.

Point IV

A party who commits the first breach of a contract cannot recover from the other party for a subsequent failure to perform.

AUTHORITIES POINT IV

12 Am. Jur., Contracts, Par. 338.

ARGUMENT POINT IV

The trial court allowed the Defendants to recover upon portions of their counterclaim for breach of contract by the Plaintiffs. It seems clear that if Plaintiffs' position upon this appeal is sound, then Defendants committed the first breaches and may not recover from the Plaintiffs for claimed later breaches.

Upon the premise that Plaintiffs have herein shown the Defendants to have been at fault, it is submitted that the judgment for Defendants upon their counterclaim should be reversed.

CONCLUSION

It is submitted that the Defendants herein were shown guilty of an alarming and serious disregard of their duties to the public to furnish milk of acceptable quality and to distribute milk in properly labeled and branded containers. It appears that the Defendants not only furnished milk of inferior quality and in misbranded containers but did so with knowledge of their obligations and in wilful disregard of their duty to the consuming public. As is revealed by the statement of the case, the Defendants' conduct commenced when the Oregon Milk Control Law went out of existence and the only fair inference from such fact is that as long as the regulations existing in the state of Defendants' incorporation were in effect the Defendants observed them but that when regulation in the Defendants' home state went out of existence the Defendants deliberately flouted the laws and regulations of the neighboring state.

The attitude of "the public be damned" which is implicit in the wilful acts of the Defendants makes it difficult to understand the sympathetic view toward the Defendants and the unsympathetic attitude toward Plaintiffs which was displayed by the trial court early in the case (R. II 47-48, 86-88). Perhaps the trial court regarded the occasions when the butterfat content fell below the prescribed minimums as inconsequential, or the average as being the test. If so, it was clear error, as the laws in question establish the absolute minimum below which the actual butterfat content should never fall.

The court below found in its oral opinion that the Defendants had furnished milk which was below the standards required in the Plaintiffs' distribution area, and below that required by the contract, and that the Plaintiffs suffered a loss of business and were damaged by reason of the prosecution by the Cowlitz County authorities. It appears that the court therefore found all essential facts necessary to Plaintiffs' recovery, but did not allow Plaintiffs' recovery by reason of the mistaken view as to the law as has been shown above.

The Plaintiffs seek by this appeal to obtain a reversal of the judgment below and the award of such damages to the Plaintiffs as seems correct and proper under the evidence relating thereto. The Plaintiffs further suggest that if the evidence as to the amount of damages is not sufficient, the case be remanded for the taking of further evidence on this subject.

Respectfully submitted,

BARZEE, LEEDY & ERWIN,
HERMAN L. LIND, JR.,
Attorneys for Appellants.

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN A. MERZ and CHARLES L. BRAY, doing business as All-Jersey Dairy,

Appellants,

vs.

SUNNYBROOK FARMS MILK AND ICE CREAM CO., INC., a corporation and POLAR PIE ICE CREAM CORPORATION,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court for the District of Oregon

FILED

MAY - 3 1958

PAUL P. O'BRIEN, CLERK

BRYSON AND DEICH,
DEAN F. BRYSON,
Attorneys for Appellees.

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Appeal from the United States District Court for the District of Oregon

SUPPLEMENTAL STATEMENT OF CASE

The appellees are milk and ice cream processors and distributors: both companies operating in the same plant in Portland, Oregon, for a period of 25 years (R. II 209) under the same management. They distribute and sell their milk and ice cream products in the greater Portland area and in Vancouver, Washington, in their own trucks.

On June 23, 1954, they entered into a written contract (Def. Ex. 1) with appellants to sell them all their required milk and ice cream products for their business in the Cities of Kelso and Longview, Washington. Appellants are known in the trade as non-processing distributors or milk peddlers. The written contract of June 23, 1954, sets forth the full agreement between plaintiffs and defendants. By said agreement the plaintiffs agreed to assist in securing an adequate supply of milk for their sales and in doing this they secured certain milk producers or milk shippers and picked the farmers' raw milk up and delivered it to the defendants' plant in Portland, Oregon, for processing, where they, in turn, picked up their processed supply of milk and returned it for distribution to Kelso-Longview, Washington.

Until the decision in the case of *State ex rel Safeway vs. Omdahl*, 37 Wash. 2d 733, 225 P.2d 1065, the State of Washington Department of Agriculture refused to license Portland dairies or allow them to do business in the State of Washington in competition with Washington dairies (R. II 96, 97). Plaintiffs, through their contract with defendants, were one of the first distributors to sell Oregon processed milk in Kelso, Longview, Washington, and the only dairy at that time with half-gallon cartons which allowed sale at a favorable or lesser competitive price.

Cowlitz County, in which the Cities of Kelso-Longview, Washington, are located, had a separate milk sanitarian operating separately from the Washington State Department of Agriculture (R. II 68, 69).

Milk in the State of Washington at that time was defined by Washington Laws of 1949, Chapter 168, Section 21, R.C.W. 15.32.180, to be:

“The whole unadulterated lacteal secretions from cows or goats containing not less than 8% of milk solids exclusive of fat and not less than 3.25% of milk fat, and not obtained within 10 days before parturition or 7 days thereafter. . . .”

(R. 11 90, 91, 32). The State of Washington amended its definition of milk, effective June 10, 1955, to define milk containing not less than 8.25% of milk solids, exclusive of fat, and not less than 3.50% of milk fat.

Cowlitz County attempted to adopt an ordinance or county code requiring milk sold in that county to be not less than 3.6% butterfat (R. II 84, 86).

On April 28, 1955, a criminal complaint was issued out of the Justice Court of Cowlitz County, Washington, on the complaint of the county milk sanitarian Joe L. Walker against the plaintiffs charging them with the crime of the sale of adulterated milk by having in their possession, with intent to sell, milk containing less than 3.6% of milk fat (R. I 17, 18). The matter came on for trial on June 6, 1955, and the court held that the county ordinance was invalid, because there had been no legal publication or public hearing prior to the adoption of said purported county ordinance, as required by state law, and also, that it was in conflict with the State Fluid Milk Act, Washington Laws 1949, Chapter 168, which define milk as containing not less than 3.25% butterfat (R. II 85 and R. II 17). The criminal complaint against the plaintiffs was dismissed by order of

the court (Pl. Exs. 15-A and 15-B). The plaintiffs received unfavorable publicity by reason of the criminal complaint and attempted prosecution and, in their evidence, claim that their business suffered and declined as a result of it.

However, about this same time or shortly after the prosecution, Arden Farms and Carnation Milk Company, two other competitive milk companies with the half-gallon carton began doing business in the Kelso-Longview area (R. II 97).

Also the milk shippers or producers that plaintiffs had obtained for their supply of milk ceased shipping their milk through plaintiffs to defendants' plant for processing and started selling their milk in gallon jugs, which they had bottled and processed at another milk plant in the State of Washington on the Kelso-Longview retail market directly in competition with plaintiffs' milk (R. II 95 and R. II 118). In August, 1955, the plaintiffs, contrary to their agreement with defendants, began buying some of their supply of milk from Valley Farms, a competitive milk plant situated at Vancouver, Washington (R. II 119).

Also between March and October, 1955, the plaintiffs failed to make payment to defendants for their milk and ice cream as provided in the contract (Def. Exs. 6, 7 and 8), and on October 16, 1955, they owed defendants the sum of \$5,820.59 for milk and \$649.20 for ice cream, and it was necessary for defendants to bring action against the plaintiffs to collect these sums of money (R. II 124, 125 and R. I 25).

On November 17, 1955, plaintiffs ceased purchasing any of their milk and ice cream products from defendants and begin purchasing their milk and ice cream from Arden Farms, competitor of defendants (R. II 124), and on December 14, 1955, filed the above entitled civil suit against the defendants.

DISCUSSION OF PLAINTIFFS' SPECIFICATIONS OF ERROR

Point I

“The court erred in finding that defendants had performed their contract and in failing to find that defendants had breached their contract by furnishing substandard and misbranded milk.”

While the written contract of June 23, 1954, does not provide how the milk cartons will be labeled or what percentage of butterfat will be in the milk furnished, there is no quarrel with plaintiffs' contention that there is an implied warranty that the milk and ice cream and other products sold would be merchantable and fit for the purpose intended.

It is appellees-defendants' contention that the milk and ice cream and other products furnished to plaintiffs-appellants over the 17-2/3 months period of the 36 month contract did comply with this warranty of fitness and did comply with the public health and milk laws of the States of Washington and Oregon.

Of all the butterfat tests run on plaintiffs' milk at the request of the Cowlitz County Milk Sanitarian, Mr.

Walker, only one or two appears to be below the 3.25% butterfat requirement of the State of Washington prior to June 10, 1955 (R. II 53, 82, 83, 99). There is no evidence that there was any excessive bacteria count or that the ice cream or other products were in any way defective. In fact, the same month in which the trial was had on the criminal complaint was the largest month of sales of ice cream by plaintiffs during the 17-2/3 months they received their supply under the written contract (R. II 198, 199).

There is no question but what the Cowlitz County Sanitarian, Mr. Walker, was taking more samples and tests of plaintiffs' milk than other competitive dairies with plants located in Kelso-Longview. Judge Solomon in his oral opinion (R. I 46, 47) stated:

"It seems to me that in this particular case there were quite a few inspections made of the milk of the plaintiffs, and I think that Mr. Walker was particularly vigilant about watching for Oregon milk in this particular instance."

The Sanitary Agent, Mr. Walker, testified in answer to a question as follows:

" . . . or I was going to jerk his permit, and he could either sell milk that met the standard in Cowlitz County or he will be ruled out, and he didn't seem to be able to get it from Sunnybrook."

The milk plant of Sunnybrook was inspected by the Oregon State Department of Agriculture and by the Public Health and Milk Department of the City of Portland, all subject to the requirements of the United States Public Health Code (R. II 282-285 and

R. II 289) (Def. Ex. 12). These examinations made by the Oregon Department of Agriculture and the Health Department of the City of Portland on their own behalf and on behalf of the State of Washington found the milk plant and its products to be sanitary and meeting the requirements of both the State of Washington and the State of Oregon. The plant or none of its products were ever degraded. As to the two butterfat tests above referred to that were found to be below the minimum butterfat requirement of the laws of the State of Washington, this should be stated. All samples of milk for the purpose of testing butterfat under both the laws of the State of Oregon and the State of Washington are taken pursuant to the United States Public Health Service Milk Code.

Sec. 15 of the 1949 Fluid Milk Act (R.C.W. 15.36.-540) is as follows:

"Sec. 15. Save as in this Act provided, this law shall be enforced by the Director of Agriculture in accordance with the interpretations contained in the *United States Public Health Service Milk Code* as from time to time adopted and amended."

The United States Public Health Service Milk Code is as follows:

"SECTION 6. THE EXAMINATION OF MILK AND MILK PRODUCTS.

"During each grading period at least four samples of milk and cream from each dairy farm and each milk plant shall be taken on separate days and examined by the health officer. Samples of other milk products may be taken and examined by the health officer as often as he deems necessary. Sam-

ples of milk and milk products from stores, cafes, soda fountains, restaurants, and other places where milk or milk products are sold shall be examined as often as the health officer may require. Bacterial plate counts and direct microscopic counts shall be made in conformity with the latest standard methods recommended by the American Public Health Association. Examinations may include such other chemical and physical determinations as the health officer may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the Association of Official Agricultural Chemists. Samples may be taken by the health officer at any time prior to the final delivery of the milk or milk products. All proprietors of stores, cafes, restaurants, soda fountains and other similar places shall furnish the health officer, upon his request, with the names of all distributors from whom their milk and milk products are obtained. Bio-assays of the vitamin D content of vitamin D milk shall be made when required by the health officer in a laboratory approved by him for such examinations.

“Whenever the average bacterial count, the average reduction time, or the average colling temperature falls beyond the limit for the grade then held, the health officer shall send written notice thereof to the person concerned, and shall take an additional sample, but not before the lapse of 3 days for determining a new average in accordance with section 1 (S.). Violation of the grade requirement by the new average or by any subsequent average during the remainder of the current grading period shall call for immediate degrading or suspension of the permit, unless the last individual result is within the grade limit.”

Pertinent parts of the *interpretation* of the said Section 6 of the *United States Public Health Service Milk Code* contain the following:

"Samples upon which grades are to be based should be taken from supplies while they are still in the possession of the dairyman. Any other practice would be unfair to the dairyman, as once the milk is out of his possession it is beyond his control. For this reason Section 6 contains the sentence requiring that milk samples must be taken while in the possession of the dairyman.

"The last paragraph of section 6 provides for degrading or suspension of the permit upon violation of the bacterial or cooling requirement. The intent is to avoid punishment until the dairyman has been notified and has been given an opportunity to correct the condition. . . .

"The above constitutes the public-health reason for grading milk partly on the basis of the bacterial count or the reductase test.

"The collection of milk samples.—In order to yield significant results milk samples must be collected so as to represent the condition of the milk when reaching the consumer or milk plant receiving station. Therefore they may not be taken at the dairy, but must be collected either from the delivery vehicles or at the milk plant or its country receiving stations. . . .

"In case of bottled milk, a pint or quart bottle shall be taken at random from the truck by the inspector, and the top covered with paraffined or parchment paper so as to assure the dairyman that the milk will not be contaminated en route to the laboratory by the hands of the inspector or by the ice in the sample case. The sample tag must be filled out by the inspector at the time the sample is taken, and the wire twisted tightly about the neck of the bottle, thus binding tight the paper cover.

"When samples are to be shipped to a laboratory located in another city (a central or branch State laboratory) the same procedure must be

followed, the milk being transferred to the shipping-case containers, the bottles shall first be thoroughly shaken and the cap and lip carefully swabbed with alcohol or chlorine solution. The milk shall then be carefully poured into the shipping bottle, the tag being immediately transferred, so as to avoid mixing of tags." (Italics ours.)

Washington Laws of 1907, Ch. 234, Sec. 11 (R.C.W. 15.32.540).

"Right of entry—Samples—Duplicate to owner. The director and his deputies may enter any place or building where he has reason to believe that a dairy product or imitation thereof is kept, made, sold, or offered for sale, and open any receptacle containing or supposed to contain any such article, and examine the contents thereof and he may take the article or a sample thereof for analysis. *If the person from whom the sample is taken requests him to do so, he shall at the same time and in his presence seal up two samples of the article taken, one of which shall be for examination or analysis, and the other taken shall be delivered to the person from whom the article is taken.*" (Italics ours.)

There is no evidence that Mr. Walker or his assistants made a sample of the milk taken for inspection available to the defendants or the plaintiffs and it is an admitted fact that one of the low tests was taken from a half-pint of milk rather than from a pint or quart bottle as required by the United States Public Health Service Milk Code (R. II 103 and R. II 84). The reason for this prohibition is that in a small container such as a half-pint, a larger percentage of the butterfat, as compared with milk solids, has a tendency to cling to the container, thus reducing the butterfat test of the total contents of the small container.

APPELLEES' CONTENTION TO POINT I

For the above reasons appellees contend that their products furnished to the appellants under the written contract of June 23, 1954, were merchantable and fit for the purpose intended and met the qualifications of the laws of the State of Oregon and the State of Washington and any slight variation therefrom was not the proximate cause of any damages which the appellants might have suffered.

DISCUSSION OF PLAINTIFFS' SPECIFICATIONS OF ERROR

Point II

"Where acts or omissions occur in breach of a duty and criminal prosecution of the person to whom the duty is owed may reasonably be expected to follow, such criminal prosecution, if it occurs, is the proximate result of the breach."

The above is not an accurate statement of the point of law which counsel for appellants states in his brief at page 14 "is the crux of this appeal". The criminal complaint in this case was not for the violation or omission of a breach of duty of a valid law. In the present case a criminal charge was filed on the complaint of the Cowlitz County Sanitary Milk Agent for " . . . the crime of sale of adulterated milk as follows, to wit: that said John Merz and Charles Bray then and there being, did then and there wilfully and unlawfully offer for sale and have in their possession with intent to sell, adulterated milk, to wit: milk containing less than

3.6% milk fat;" based on the Cowlitz County Milk Code requiring milk to be not less than 3.6% milk fat. There is no breach of a duty if there is no valid law establishing a duty.

At the trial on June 6, 1955, the court held (Pl. Exs. 15-A and 15-B) the ordinance on which the criminal complaints were based to be invalid because there had been no public hearing or notice of a hearing prior to the adoption of the ordinance and also that it was in contravention of the Washington State Fluid Milk Act (Washington Laws 1949, Chap. 168), which defined and required milk to be not less than 3.25% milk fat.

In the present case the criminal prosecution was based on an ordinance found to be invalid and, therefore, there was no breach of a duty.

At the trial (R. II 142-145) and in their brief (pages 10, 11) appellants relied upon *Segal v. Horwitz Bros.*, 32 Ohio App. 1, 167 N.E. 406. In the Segal case the attempted prosecution was under a *valid law* making it a crime to knowingly *receive stolen property*. There is no question but what the criminal complaint was brought under a valid statute making it a crime.

In the Cowlitz County case against the appellants the criminal complaint was based on an ordinance found by the court and as shown by the record in this court "*to be invalid.*"

In a trial on the merits in a criminal case based on a valid statute the question of probable cause is not passed on, and it does not necessarily follow that failure to convict would show a lack of probable cause. Failure

to convict could depend on many contingencies other than probable cause.

However, in the Cowlitz County case against appellants the court held the statute to be invalid, an entirely different situation from the Segal case.

The general rule is that an invalid or unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.

Since an unconstitutional or invalid law is void, the general principles follow that it imposes no duties and confers no rights. No one is bound to obey an unconstitutional or invalid law and no courts are bound to enforce it. Quoted in effect from 11 Am. Jur., Constitutional Law, Par. 148, pages 827-829.

When the statute or charter provides a mode of procedure for municipal councils designed to protect the citizens and taxpayers from hasty and ill considered legislation or to enforce publicity in the actions of the council, the mode of procedure thus prescribed must be strictly observed. Such statutory provisions constitute conditions precedent, and unless an ordinance or resolution is adopted in compliance with the conditions and directions thus prescribed, *it will have no force*. 37 Am. Jur., Municipal Corporations, par. 144, page 756. In other words, the ordinance which Cowlitz County attempted to pass requiring milk to have 3.6% butterfat had no force.

APPELLEES' CONTENTION TO POINT II

The intervening act of the County Court adopting an invalid ordinance and the intervening act of an overzealous County Sanitary Agent bringing a criminal complaint to prosecute plaintiffs under an invalid ordinance was the probable cause of any damages which the plaintiffs might have sustained by reason of the unfavorable publicity which they received as a result of the criminal charge and the trial.

In each of the cases relied upon in plaintiffs' brief under Point II, the original complaint was brought under a valid law and so, of course, the question of probable cause was a matter to be determined by the court in each of the actions for damages. In not one of the cases cited was the original action brought under an invalid or unconstitutional law.

Judge Solomon in his oral opinion (R. I 47) stated:

"I don't think that I can speculate upon what might have happened had the plaintiff been prosecuted under the state law because, in fact, they were prosecuted under a county law which the court there held was invalid."

This is surely correct because there was no criminal complaint brought under the valid Washington Fluid Milk Act and it is doubted, from the method of taking samples, if any such a complaint could have been brought.

DISCUSSION OF PLAINTIFFS' SPECIFICATIONS OF ERROR

Point III

“Difficulty of ascertainment is not a bar to the recovery of damages and if the fact that damages have been sustained is established the court will adopt a method for fixing the amount.”

The problem of assessing damages is a moot question unless the court first finds that the appellees are liable for appellants having been prosecuted under an ordinance found to have been invalid. The record is almost non-existent as to any evidence that appellants might have suffered any damages from any cause other than the result of the criminal charge under the invalid ordinance. Mrs. Bray, the wife of one of the plaintiffs, testified in response to the question “Did your business increase considerably when you went to Arden Farms?” “A. No, our reputation was too badly damaged to increase.” (R. 11 181). One of the other witnesses, Neva Peterson, stated in response to the question “What was unsatisfactory about it?” “A. I never did find any cream on it.” In response to a course of questions, she stated “I couldn’t see some cream and there never was no cream on it. (R. II 176). But the evidence showed that the all jersey milk was only bottled in homogenized milk, where there is no visible cream line and all the fat nodules are homogenized into the milk solids. Judge Solomon in his oral opinion (R. I 49) stated:

“And I say even if the plaintiffs, in fact, lost

money beginning in May or June, 1955, it was the result of the prosecution and not because of any of these other matters."

From a reading of the evidence (R. II 94, 97) it is clear that if plaintiffs did suffer loss of business, it certainly could be contributed to additional competition or cut prices and competition on the one gallon jugs of milk from the farmers originally shipping milk through them and from Carnation Milk Company and Arden Farms both coming on the same Kelso-Longview market with the half gallon milk carton.

APPELLEES' CONTENTION TO POINT III

15 Am. Jur., Damages, par. 18, page 408:

"It is also fundamental that the damages which the plaintiff is entitled to recover in a civil action for damages are, in the absence of any statutory modification of the rule, such only as are natural and probable consequences of the wrongful act or breach of contract. The law of damages is not concerned with the effect of remote causes, but only with those consequences of which the act complained of is the natural and proximate cause—that is, those which naturally and proximately flow from the original wrongful act."

15 Am. Jur., Damages, par. 52, page 451:

" . . . from the breach of the contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it, and the pronouncement in that case has been generally accepted as an accurate statement of the law of the subject. Thus, the rule in contract actions is to be distinguished from the

rule in tort actions, under which damages may be recovered for all injuries which proximately follow whether or not all such injuries could have been anticipated or contemplated.”

Two Oregon cases are in point, both of which have been cited by appellants in their brief, but appellees feel that they are more properly cited in favor of appellees’ position above stated. The first is *Blagen vs. Thompson*, 23 Or. 239. This is a contractual case where the defendants failed to build a road which they had agreed to do and the plaintiffs sue for damages by reason of the breach. At page 248 the court says:

“The difficulty in the determination of the question thus presented and in like cases, lies not so much in the ascertainment of the law of the subject, as in its application to the facts of the particular case.”

At page 253 the court said:

“ . . . It may be difficult for plaintiff to prove with exactness what would have been the value of the land with the contract fulfilled; but such uncertainty does not prevent him from recovering such damages as he may be able to prove. He is only required to give such evidence as the nature of the case will permit bearing upon the nature of his damages and legally tending to prove such value . . . ”

In the *Krause vs. Bell Potatoe Chip Company* case, 149 Or. 388, plaintiffs claim a violation of a contract, entered into with defendants, by the defendants when the defendants came out with a new product and cut his commission from 20% to 10% on the new product. The court at page 394 says:

"The rule that damages, which are uncertain or contingent, cannot be recovered, does not apply to an uncertainty as to the amount of the benefit or gain to be derived from performance of a contract, but to the uncertainty or contingency as to whether there would be any such gain or benefit derived at all: *Blagen vs. Thompson*, 23 Or. 239, 240 . . . "

Appellees knew that their milk must comply with Washington and Oregon laws pertaining to milk for sale for human consumption, but it certainly was not within the contemplation of the contracting parties that the milk would have to comply with any other law such as the ordinance adopted by Cowlitz County. In fact, there is no definite evidence in the record that appellees knew that there was a Cowlitz County ordinance requiring milk sold in that county to be not less than 3.6% fats, not solid (R. II 86 and R. II 267-268).

Furthermore, there is not one scintilla of evidence in the record that appellee, Polar Pie Ice Cream Corporation's ice cream products were faulty or ever objected to by appellants or by any of the state or county sanitary inspectors and the ice cream products were certainly not involved in the Cowlitz County criminal prosecution.

Judge Solomon made a finding (R. I 41):

"That the books and records of the plaintiffs were fragmentary and incomplete and did not accurately reflect the condition of plaintiffs' business at any time during the life of the contract between plaintiffs and defendants and said books and records were of such a nature and condition that the court could not determine with any degree of accuracy the gross business or net loss of the plaintiffs, if any . . . "

In fact, the books of the appellants were so poor and incomplete that they were not received in evidence (R. II 303). The court addressing itself to Mr. Bryson:

"I want to know something about the question of damages. Did you look at the books and records that have been made available to you?"

Mr. Bryson: I understand these are not in evidence. I didn't know they had been received.

The court: No, they have not been received."

(R. 11 304) the court addressing itself to Mr. Leedy:

"As far as the books are concerned, it is pretty difficult to tell anything from these books.

Mr. Leedy: We will withdraw them."

Certainly it was the plaintiffs' burden to bring before the court evidence of what their damages were. Other than some very general statements by the plaintiffs in their testimony, there is only in the record Plaintiffs' Exhibit No. 11 which purports to be a recap of wholesale monthly sales and it was never tied in to any original records, and Plaintiffs' Exhibits 18-A and 18-B, copies of their 1954-1955 U.S. income tax.

DISCUSSION OF PLAINTIFFS' SPECIFICATIONS OF ERROR

Point IV

“A party who commits the first breach of a contract cannot recover from the other party for a subsequent failure to perform.”

Appellees wish to point out that the appellants were the first to breach the contract, in that:

(a) They failed to make payments as provided under the terms of the contract (Def. Exs. 6, 7 and 8).

(b) They purchased milk from Valley Farms, a competitor of appellees without notifying appellees (R. II 191-194 and R. II 119).

(c) They failed to assist appellees in securing an adequate supply of milk for appellants' and appellees' sales which would be handled through appellees' Washington pool, as provided on page 2 of the contract (R. II 118).

CONCLUSION

It is submitted that Judge Solomon made the only decision that was possible under the law and facts following the trial in this case. The whole tenor of the testimony shows that, if appellants suffered any damages, it was in the summer of 1955 following the June, 1955, trial of appellants under an invalid ordinance. Also, about this same time the economic conditions on the Kelso-Longview market changed completely. The

farmers who were shipping milk through the appellants withdrew their milk and started selling it themselves in gallon glass jugs at a reduced price in competition with appellants. Also two large dairies, Carnation Milk Company and Arden Farms, both came on the Kelso-Longview market with a competitive half gallon paper milk carton. Under these circumstances, it is submitted that the appellants could not have remained in business regardless of any conditions that might have existed between appellants and appellees under the terms of the written contract of June 23, 1954.

Respectfully submitted,

BRYSON and DEICH,
DEAN F. BRYSON,
Attorneys for Appellees.



United States Court of Appeals For the Ninth Circuit

HARRY JOSEPH, *Appellant*,

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN; M. H. WYMAN, and
BRYANT R. DUNN, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPENDICES TO BRIEF OF APPELLEES

Appendix I — Trial Court's Oral Decision

Appendix II — Trial Court's Findings of Fact, Supported by References to the Record, and Conclusions of Law

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United States Court of Appeals

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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Supported by References to the Record, and Conclusions
of Law

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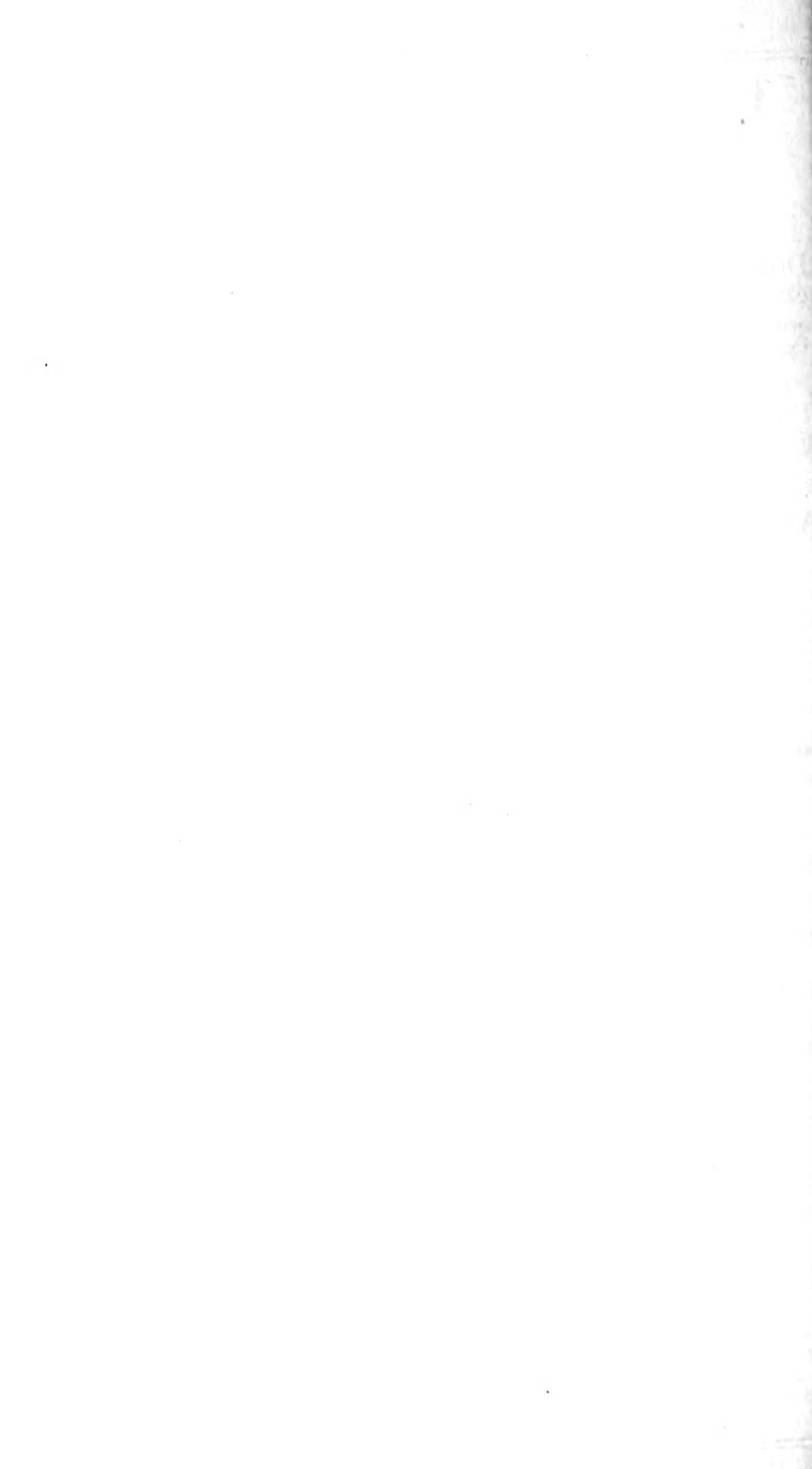
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dence was concluded. This particular motion, the memoranda submitted, and the argument have been fully considered. Extensive time and thought have gone into it.

I have concluded, gentlemen, that I am as able now as I ever will be, to decide this matter as well [2126] as I can decide it within my ability and experience. Accordingly, I will do so. I am the more persuaded to do this because, gentlemen, whether right or wrong about it, I have no doubt whatever in my mind what the answer to this problem must be. I mean that the matter seems clear and certain to me even though I hope I am reasonably conscious of my own limitations and of the fact that many of the matters that are presented to me for decision here involve questions to which only the Deity could provide the true answers.

The reconstruction of past events, in the great majority of cases, at least, is not now an exact science nor is it ever likely to be, human nature continuing as it is. All that I can do in this position is to exercise such reason and judgment as I have, in the light of such experience as I have had, on such evidence as has been presented to me. Absolute certainty is an impossibility in this naughty world. The best we can do is to have a moral certainty, a reasonable certainty, which may vary according to the circumstances. In my own mind I have a certainty to that extent on the questions presented to me here which I consider primarily questions of fact. [2127]

I want to make two or three preliminary statements lest there be any misunderstanding. If these parties

had an agreement amounting to a contract resulting in a fiduciary relationship between them, and it was violated by any of the defendants, whether intentionally or not, the Court would be just as indignant at such a breach of faith as the plaintiff's counsel, and I think quicker to grant relief than the plaintiff was to ask for it in this particular case.

Prior to dealing with this case I had never met, nor as a matter of fact, ever even heard of Mr. Joseph or Mr. O'Donnell or Mr. Chinn, or any of the primary actors involved in this controversy. I never heard of them, as I say, and I have no acquaintance whatsoever with any one of them, and thus have made my judgment of the facts and of the credibility of Mr. Joseph, Mr. O'Donnell, Mr. Chinn, and Mr. Terman solely on what I have seen and heard here in the courtroom.

I want to say another general thing about the credibility of the witnesses. Part of the responsibility of a trier of the fact in weighing the credibility of witnesses is to look at them and to listen to them to try to evaluate the kind of people they are, [2128] and to gain some impression from the way they testify and from their appearance and demeanor as to what kind of people they are, how credible they are, and what weight and value should be given to their testimony. Sometimes it happens, gentlemen, that the very forensic defects and inadequacies of a witness will speak more forcefully of his credibility and the meaning of the words he uses than if he were more glib, more positive and certain about the matters concerning which

he gives testimony. I have seen the thing happen with juries time and again. It happens, certainly, with me as an individual. It has happened in this particular case. The very inadequacies of Mr. O'Donnell, as a witness, somehow or other have brought to me a conviction as to his integrity and credibility that might be difficult to understand simply from a reading of the cold record of exactly what he said.

I cannot subscribe to the castigation of Mr. O'Donnell's character and of his testimony that counsel for the plaintiff have given in their briefs and argument, although I am far from resentful of their [making it].* It is their duty to make that contention [if they sincerely] believe the record supports it. I [haven't any doubt] of the professional integrity of [2129] plaintiff's counsel; I just can['t] agree with their view, and I don't agree with it. I must say that Mr. O'Donnell impressed me most favorably. Obviously, he is not a man that speaks glibly and readily. He is a lumberman, familiar with forests and the running of sawmills, but I should gather from hearing his testimony that he is inexperienced as a witness and as a person who is required to formulate his thoughts into precise and exact words, particularly in response to adroit and exhaustive examination by adverse counsel.

Apropos plaintiff's contentions concerning his testimony being uncontradicted in some particulars, I remind you of the rule that neither this Court, nor any other trier of fact, is obliged to accept as true the testi-

*Words within brackets supplied from stenographic transcript of District Court's proceedings.

mony of parties and interested witnesses merely because there may be no directly controverting testimony; particularly is this true if the so-called "uncontradicted" testimony is found inherently incredible. Actually, in most, if not all, of the instances of uncontradicted testimony asserted by plaintiff, direct evidence to the contrary can be found in the record.

Now, one other preliminary. The precise matter now before me is a motion to dismiss under [2130] Rule 41(b). 41(b) provides in part: "After the plaintiff has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief." The next following sentence reads: "In an action tried by the Court without a jury, the Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all the evidence."

I take that language to mean that in a non-jury case on a motion to dismiss, the Court may weigh the evidence, as the old phrase used to be, or evaluate the evidence, and if the Court feels that it can do so, reach a conclusion on the facts upon the evidence presented up to that time. I understood that counsel in this case agreed to that proposition when we suspended in November. I notice that there is some possible suggestion to the contrary in plaintiff's brief, but since no further point has been made of it, I assume that all concerned adhere to the views expressed at the conclusion of our

hearing in November. In any case, for your enlightenment, [2131] and that is the only purpose of my speaking of it, I consider that I am permitted now, in the present posture of the case, to weigh and evaluate the evidence and to find the facts, if I feel that I can do so on the basis of the evidence before me.

Ordinarily I would not give too much time to a motion to dismiss where a considerable period of time had been devoted to trial of the case, and only relatively little additional time might be necessary to hear the whole evidence. Generally I feel that it is desirable to have the entire evidence presented so that on review, if appeal be taken, there will be no limitation upon the questions presented on the appeal and the whole case may be finally disposed of more readily on review, regardless of the result of the appeal.

In this particular case, however, it happens that the plaintiff has introduced substantial portions of the testimony of most, if not all, of the principal persons who might have knowledge of the facts of the case. Presumably, the testimony not offered at least would not affirmatively improve the plaintiff's case. Therefore, in this particular situation, I feel that it is especially appropriate that the Court very carefully examine the evidence presented [2132] and, if possible from that evidence, make a determination of the controlling facts. That is exactly what has been done during the presentation of the evidence and in the longer interval since. Consideration of the case has by no means been limited to the argument heard today. Many hours of careful and extensive study have been given to it.

Now, with that background, what are the problems? The very first step in this case is to determine what the relationship of or between Joseph and O'Donnell was during the period in question. It is clear that that relationship, so far as plaintiff's claim in this case is concerned, must be grounded in a contract. In other words, a contract in the full legal sense of that term is an essential basis of any right to relief plaintiff might have. The relationship called joint venture sounds in contract and without a contract the relationship does not exist.

Adverting to first principles and Hornbook law, we recall that a contract is a legally enforceable agreement between two or more parties. The essential elements necessary to transform an agreement into a legally enforceable contract include, among other things, competent parties, a subject [2133] matter, legal consideration, mutuality of agreement, and mutuality of obligation. The element of mutuality of agreement, or mutual assent, frequently has been referred to in the law as a "meeting of the minds" of the parties to the contract or agreement. To create a contract, then, the minds of the parties must meet as to every essential term of the proposed contract, and there must be a clear and unequivocal acceptance of a certain and definite offer in order that a mere agreement may become a contract. Therefore, it is necessary, among other things, that the minds of the parties meet as to the essential terms of the proposed contract. There must be a reciprocal assent to a certain and definite proposition between them. As long as any substantial or material

matters are left open for further negotiation or consideration on an essential and necessary element of a proposed contract, the contract is not complete, and the agreement, if there has been such, is not enforceable as a legally enforceable contract.

Now, those are all Hornbook propositions that every one of us has heard since our first year of law school. The question is, how do we apply those principles to this case. The *sine qua non* of Joseph's case has to be a "meeting of the minds," [2134] a specifically known and understood agreement, between him and O'Donnell, that they were going to make a joint purchase of Kinzua. Irrespective of other contract elements that might be required, at least that one essential fact would have to be found as an indispensable element of plaintiff's case.

The burden rests upon the plaintiff in the first instance to establish the existence of the joint purchase agreement as an element of a contract of joint venture. A mere preponderance of evidence would be sufficient to establish the existence of the contract in the first instance. The initial question that I have to concern myself with is whether there is a preponderance of the evidence here showing that Joseph and O'Donnell had a specific, definite, and clear offer and acceptance between them to the effect that they were going to make a joint purchase of this Kinzua property. Such a contract could only be established by either express words to that effect or by implication arising from the conduct of the parties or by a combination of both. There

is no other possible way that it could arise, that basic contractual relationship between them. [2135]

Now, let us consider each of those methods separately. The only spoken or written words claimed by Mr. Joseph to be express words amounting to such a contract are those that he said he spoke to Mr. O'Donnell and heard from him on November 18, 1952, in a bar at the University Club in Portland over a drink. Nowhere else are there claimed to be any express words sufficient to constitute a contract. After pondering this very long and arduously, I am completely satisfied that there were no express words of agreement passing between Joseph and O'Donnell which would amount in law to a contract. I cannot find that any such words were spoken by Joseph or, if so, that they were understood and assented to by O'Donnell.

I am not going into the details of telling you why I have reached that conclusion, gentlemen, because there are a great many factors appearing in the evidence that lead me to that conclusion. I think you may have gotten one facet of it from the comment that I made during Mr. Hokanson's argument, and I will mention that only, without intending *expressio unius est exclusio alterius*. I can't believe and don't believe that Chinn and O'Donnell are such scoundrels and so stupid as originally [2136] by deposition to have denied meeting Mr. Joseph the evening of November 18 when in fact they remembered the meeting. It would be ridiculous, in the light of the telegram, hotel registration, and other records of the event which they must have had in mind if they actually remembered the

meeting. Moreover, if both of them were that foolish and dishonest, I can't imagine that their counsel would have been so during this period of about a month before the depositions, while they were, according to Mr. Clinton, rehearsing and drilling Mr. O'Donnell and Mr. Chinn for their testimony. I gather the impression that Mr. Clinton feels that Mr. O'Donnell at least went through quite an educational period prior to his deposition. I can't imagine that these counsel would be so inadequate to the situation as not to inquire whether they registered at a hotel or whether they sent any telegrams or whether they had signed any chits. Even if I thought Mr. O'Donnell and Mr. Chinn to be as untrustworthy as the plaintiff contends they are, I couldn't believe them to be so unwise as to deny what they must have known could easily and indisputably be proved.

I am absolutely satisfied that Chinn and O'Donnell completely forgot ever having met Joseph [2137] the night before the meeting with Coleman on November 19th. If so, then I can't believe that at that genuinely forgotten or overlooked meeting O'Donnell consciously and expressly made a commitment for a 50-50 joint purchase of properties running into multiple millions of dollars in value. If they did so, the drink in progress at the time of the alleged commitment must have been extremely intoxicating. This is just one of the many circumstances in the evidence that has led me to the firm conclusion that there were no express words of mutual understanding and assent sufficient to amount to contract between Joseph and O'Donnell.

I have no doubt that Mr. Joseph may have spoken hopefully of the matter. Surely, he wouldn't have come by the way of Portland on his way to California from Chicago if he didn't have hope something of profit might develop. It is quite likely that he did speak hopefully of the matter and perhaps expressed the hope or even suggestion that somehow or other, sometime or other, a deal might be worked out. However, let us keep in mind now, gentlemen, that here are two total strangers that at that time never have had any transactions before and neither one knows much about the other. [2138] Neither one of them knows much about the Kinzua properties or the basis of their possible purchase. Joseph didn't know much about it. All he knew was that Terman said Kinzua was for sale. That is all. There is very little more that Joseph knew about it. To me, the evidence is most convincing that when he learned of the magnitude of the deal the next day from Coleman, Joseph was quite astounded and realized that any personal participation by him would be relatively small. I don't think that Mr. Joseph knew very much about Kinzua on the evening of November 18th and certainly O'Donnell knew very little about it at that time.

It is difficult for me to believe that a man like O'Donnell who has lived as long as he has and been in business as long as he has and has stayed out of bankruptcy as long as he has, would buy a "pig in the poke" within a matter of a few hours of meeting a man that he never had seen before excepting sometime long prior in St. Louis and then only across the room, a man as to

whom he knows practically nothing; that he, O'Donnell, would immediately and readily over a casual drink agree to a 50-50 joint purchase in a transaction that was going to run into multiple millions of dollars. I [2139] don't believe it. That is not to say it might not have happened, but I don't believe it, and it happens to be my responsibility, at least in the first instance, to decide the fact.

Now, let us go to the next point. Was there any course of conduct between these men that gave rise to the implication that they had a legally binding contract for a joint purchase of Kinzua? I have looked the evidence over from stem to stern and I can't find it. Of course, if you start with the assumption that they had an express agreement to that effect in the first place, then you can find support for the assumption in isolated parts of the conduct afterward; but if you don't start with that assumption, you can't find a contract in the course of conduct of the parties.

As a matter of fact, one of the remarkable things about the case is the infrequency of contact between Mr. Joseph and Mr. O'Donnell in a deal involving such magnitude as this. I haven't counted them up, but the contacts between them were very, very few; not many. I don't remember the exact number, but there were a few telephone calls and a couple of notes. I don't think there ever was so much as a full-length or formal letter, and none of [2140] Joseph's notes express any terms of an agreement between them, recite it, or even refer to it. I can't imagine that Mr. Joseph is so guileless that he would be involved in a deal of this magni-

tude with a man that he had very little acquaintance with, without at least dropping him a letter expressing pleasure at meeting him and confirming an agreement made, or in some way or other making some recital of the essence of it. I just don't think that Mr. Joseph who has lived as long as he has, and has been as successful as he has, would do business that way. Now, it may be that it was so and again I may be mistaken, but I don't believe it. The evidence is wholly insufficient to establish a contract arising by implication from the conduct of the parties.

In my judgment, gentlemen, for better or for worse, the words and actions of these parties, O'Donnell and Joseph taken together, in other words, the express words and the conduct, all of it taken together, amount to no more, at the very most, than an understanding that Kinzua would be investigated and the possibility explored of a deal in which each of them might participate in some manner and to some extent never specified. I think that is the [2141] most you can say about it. I think there was no agreement at all, except at most to investigate and explore possibilities. Certainly, none of the essential elements, let alone the important details of execution, of so important a venture contract were ever expressed and cannot reasonably be implied. Under the evidence which to me seems credible, the relationship between these parties at best is so vague, indefinite, and speculative, that as the trier of fact I cannot find assent and agreement on minimum elements amounting to a legally enforceable contract. I am not going to discuss the matter of consideration

or any other particular negating contract, because in my judgment the first essential element of the case, that is, agreement to make a joint purchase, is lacking.

Among other things leading me to that conclusion is the conduct of Mr. Joseph from the latter part of March until the latter part of August. During that five-month period while he claims to have had the biggest deal of his life by far hanging fire, he never once telephoned, dropped a note, or made an inquiry of O'Donnell. His lack of interest in the matter during that five-month period is just astounding, if you accept his story that he had a [2142] legally enforceable contract with O'Donnell to share equally in a deal of that magnitude. I simply cannot believe and accept the story.

The record here shows that Mr. Joseph is a man who frequently makes memoranda concerning business transactions. The exhibits are replete with memoranda of Mr. Joseph, notes and letters to Terman, the memos and various prospecti to his Chicago friends and what not. Yet not one word from Joseph to O'Donnell for five months. Now, I think that that is inconsistent with there ever having been any contractual obligation between Joseph and O'Donnell in the first place; and, secondly, I think that under those circumstances, considering all the factors in the situation, O'Donnell was certainly justified in believing that he had no duty to Joseph, and that the relationship, if any, between them, whatever it was, had been terminated.

If you add to that five months' silence and inaction the next following circumstance, astonishment and in-

credulity increase. When Mr. Joseph saw the notice of the Kinzua sale in the "Timberman", he wrote a nice letter to Mr. O'Donnell. Now I can understand the nice letter; apparently [2143] it was to try and get some kind of admission out of O'Donnell. That is somewhat out of keeping, however, with the contention of Mr. Joseph's being so completely naive and open about the whole thing. The only way I can account for his writing such a cordial letter is on the theory that it would induce O'Donnell into making some incriminating admission or statement about the deal, because, according to Joseph's testimony and according to notes purportedly written by Joseph at the time, he felt very bitter towards O'Donnell when he wrote that letter. He didn't put that feeling or any other of his present contentions in the letter.

All right. The letter goes forward, and in September, I think it was September, he gets a response from O'Donnell. Now, that response in many respects is not very satisfactory. There is no question about it. But it certainly is clear in one thing, that O'Donnell didn't take any counsel from anyone before he wrote it. He just dashed it off, and there is no doubt that it wasn't all that it might have been from his point of view. It is another one of those things that I talked to you about at the beginning, the inadequacies, the defects of persons as witnesses sometimes speak more [2144] heavily as to their veracity than when everything they say fits together too well.

In any case, the significant thing is that Mr. Joseph didn't make any response or assert any claim for 20

months after receiving O'Donnell's letter. That is, from September, 1953, until May, 1955, when the first demand on behalf of Joseph was made. I just can't believe that that is consistent with Joseph's present assertion that he had a clear and definite commitment for a binding contract of joint venture with O'Donnell. From the end of March to the end of August, 1953, five months, Joseph made no contact whatever with O'Donnell, then he writes this cordial letter and gets a response in 30 days, or whatever it was, and then another silence for 20 months after that. Either circumstance standing alone would throw the gravest doubt on Joseph's claim of joint venture; the two together make the claim incredible and untenable.

In my judgment, whatever the relationship between Joseph and O'Donnell was—I am confident it was not joint venture or contract of any kind—but whatever it was, it was terminated at or about the end of March of 1953. I am confident that as of that time it was known and understood by the [2145] parties that Joseph's hope of participation in the Kinzua purchase was terminated, and that at the very least, under the circumstances O'Donnell had a right to believe that it was. I certainly cannot find it in my mind or conscience to believe the contrary from the evidence submitted to me. I must call the facts as I see them after carefully weighing the evidence, and that is the way I see them.

If we started with the finding that there had been a contract of joint venture between O'Donnell and Joseph giving rise to a fiduciary relationship between

them, I would approach the whole thing on an entirely different basis. In such case, the onus would be upon the defendants, as has been pointed out in the cited authorities. On the question of whether or not there had been abandonment by Joseph or laches on his part, the burden would rest upon the defendants. Even in that situation I am inclined to think that the result might well be the same. I find and hold that the long failure of action by Joseph after August of 1953 under the conditions existing at the time, amounted to laches. During that 20-month period, when there were high hazards in the Kinzua purchase and in the lumber industry generally, Joseph made [2146] no request for a part of the deal. He let defendants put up the money and the effort and take the risks. Joseph waited to assert his claim until it seemed certain the purchase would prove profitable. He is now estopped from asserting any claim he might otherwise have had.

It is easy enough, speaking from hindsight, to talk about defendant's gain of 12 million dollars or 20 million dollars, or whatever was asserted in the argument, but it is quite apparent to me that during the long hazard period when Mr. Joseph might have shared a loss and lost his shirt, he was not anxious to press any claim for participation in the purchase. That is borne out to some extent by the changes in the condition of the lumber market as to which there is no dispute in the evidence. As a matter of fact, Joseph himself called the attention of O'Donnell to the unfavorable conditions in the lumber industry in the early part of 1953.

Time is not available for further elaboration of my

views. I think the motion to dismiss the action on the merits and with prejudice must be granted. It is so ordered. [2147]

[Endorsed]: Filed Feb. 7, 1957.

[Endorsed]: No. 15669. United States Court of Appeals for the Ninth Circuit. Harry Joseph, Appellant, vs. Donover Company, Inc., a corporation, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: August 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

APPENDIX II

**FINDINGS OF FACT, SUPPORTED BY REFERENCES
TO THE RECORD, AND CONCLUSIONS OF LAW**

FINDINGS OF FACT**I.**

The court has jurisdiction of the subject-matter of this action based upon diversity of citizenship and amount. Plaintiff, Harry Joseph, is a citizen of the State of Illinois. The defendant Donover Company, Inc., is a Washington corporation having its registered office situated in Elma, Grays Harbor County, Washington; and the defendants Kinzua Corporation and Capital Timber Products are Washington corporations having their registered offices situated in Seattle, King County, Washington. The individual defendants are citizens of the State of Washington and residents of King and Snohomish counties in said state. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00 (Admitted Fact No. I, R. 153-4*).

II.

The oral memorandum decision of the court rendered in this cause on January 18, 1957 and appearing in the record herein at pages 2126 to 2147, inclusive, of the transcript, is by this reference incorporated into and made a part of these findings of fact to the same effect as if such decision were fully set forth herein. All findings of fact and inferences therefrom expressed by

*The matters within parentheses are citations to the record which support the findings for which they are given.

the court in such memorandum decision, particularly with regard to the credibility of witnesses and the weight and value to be given to the various items of evidence in the record of trial, are hereby expressly adopted and incorporated herein by this reference as if fully set forth in this paragraph (Oral Decision, R. 4246-63).

III.

(1) Kinzua Lumber Company (now dissolved) was a West Virginia corporation engaged in extensive timber, logging and lumber manufacturing operations in the State of Oregon. The assets of Kinzua Lumber Company (hereinafter called Kinzua) and its wholly owned subsidiaries consisted, among other things, of extensive timber and timberlands, mills, townsite, railway, mill and logging machinery and equipment, of the value of many millions of dollars (Admitted Fact No. III, R. 154-5).

(2) Plaintiff, Harry Joseph, is a wholesale and retail distributor of lumber products and building materials in the City of Chicago. Joseph had had no experience in timber, logging, sawmill or lumber manufacturing operations (Joseph, R. 314, 487-8).

(3) Defendant Harry J. O'Donnell is an experienced timber, logging, sawmill and lumber manufacturing operator in the Pacific Northwest (O'Donnell, R. 1406, 3388-3409).

(4) Raleigh Chinn is engaged in the wholesale distribution of plywood and other timber products (Chinn, R. 785-6). Chinn had sold plywood to and had been a business acquaintance of Joseph for many years

(Chinn, R. 788); Chinn was also a business and social acquaintance of O'Donnell (Chinn, R. 786-7).

(5) Samuel Terman is a real estate broker in Beverly Hills, California. His business was generally confined to real estate operations (Terman, R. 1146); he was totally unfamiliar with timber, logging, sawmill and lumber manufacturing operations and he had had no previous experience with respect thereto (Terman, R. 1147). Terman formerly resided in Chicago, Illinois, where he had been a longtime social acquaintance of Joseph (Terman, R. 1147).

(6) James J. Needleman and J. George Gold are attorneys at law and co-partners practicing law in Beverly Hills, California under the firm name of Gold & Needleman (Gold, R. 2883-4; Admitted Fact IX, R. 156). They were attorneys for Gladys Anderson Zurlo, one of the principal stockholders of Kinzua Lumber Company, and were directors and members of the Executive Committee of said corporation (Admitted Fact IX, R. 156; Needleman, R. 2693, 2696-8; Gold, R. 2935; Exhibit 653). Needleman was an intimate social acquaintance of Terman (Terman, R. 1281).

IV.

(1) During 1951 the shareholders of Kinzua agreed to sell their shares and they appointed Kinzua's President, J. F. Coleman, and its attorney, John T. Casey, along with two others as their sole and exclusive representatives and agents to effectuate a sale upon such terms as said representatives and agents might determine (Admitted Fact III, R. 154-5; Gold, R. 2894; Needleman, R. 2707-9).

(2) Terman learned of the proposed sale of Kinzua's stock from Needleman, but Needleman did not give Terman any specific or detailed facts or information pertinent to Kinzua or the sale of its stock (Needleman, R. 2764); nor did Terman otherwise learn or obtain any such detailed facts. However, Terman did know that the price to be asked would be substantial and that the assets included a large tract of timber, a railroad, a town and a sawmill (Terman, R. 1152-4, 1222-4).

(3) Terman told Joseph that Kinzua's stock was available for purchase (Joseph, R. 324-5; Terman, R. 1161). On October 15 and again on October 24, 1952 (while Chinn was attending a lumber convention in Chicago) Joseph told Chinn that he had learned from Terman that Kinzua was for sale (Joseph, R. 334-5; Chinn, R. 817-8), and on the latter of said dates Joseph introduced Chinn to Terman (Joseph, R. 343). On November 6, 1952 while Chinn and O'Donnell were in Los Angeles, on the separate business of each, unrelated to Kinzua (Chinn, R. 835), Chinn called Terman and Terman visited with Chinn and O'Donnell in the presence of others (Chinn, R. 871-2; Terman, R. 1221-3; O'Donnell, R. 1604-16); O'Donnell asked Terman concerning Kinzua, but Terman was unfamiliar with its operations or the terms or conditions of sale and he was unable to and did not supply any specific or detailed facts or information with respect thereto (Terman, R. 1222-3; O'Donnell, R. 1605-8). Terman reported his visit with Chinn and O'Donnell to Joseph (Joseph, R. 350-1) and to Gold (Terman, R. 1225). Thereafter Joseph arranged to meet Coleman in Port-

land on November 18 or 19, 1952 (Joseph, R. 363) on Joseph's way to a vacation in La Quinta, California (Joseph, R. 520-1; Chinn, R. 930). Joseph called Chinn in Seattle and invited Chinn and O'Donnell, an experienced sawmill operator, to attend the Portland meeting with Joseph and Coleman (Joseph, R. 363).

V.

(1) Joseph, Chinn and O'Donnell arrived in Portland on November 18, 1952 (Joseph, R. 369-70; Chinn, R. 894) and since they were unable to meet with Coleman that evening, they spent the evening together at the University Club (Joseph, R. 372) and a night club in Portland (Joseph, R. 374). Neither Chinn nor O'Donnell remembered meeting Joseph that evening until their memories were refreshed by hotel records and club bills (Chinn, R. 901-2; O'Donnell, R. 1623). Joseph and O'Donnell may have met once before, quite casually many years previously (O'Donnell, R. 1621), but they had had no previous relationships with each others, business or otherwise, and they knew little or nothing about each other (Joseph, R. 371). Except for such information as Joseph had obtained from Terman (which was substantially the same as that referred to in finding IV (2) *supra*), none of the parties **knew much** about Kinzua's property or the basis of its possible purchase (Joseph, R. 374-5). During the evening of November 18, 1952, there may have been some casual conversation concerning the exploration of the possibility of negotiating for a purchase of Kinzua, but O'Donnell did not consciously or otherwise make or assent to any offer, proposal, agreement, commitment or understanding with respect to Kinzua, nor did any

conversation or event of that evening lead Joseph to believe that O'Donnell had made or intended to make or assent to such an offer or commitment (Chinn, R. 905; O'Donnell, R. 1655).

(2) On the morning of November 19, 1952, Joseph, Chinn and O'Donnell met with Coleman and Casey (Admitted Fact VIII, R. 156; Joseph, R. 375). At the meeting Coleman and Casey announced that Kinzua's sales price was \$12,000,000.00 (Joseph, R. 378; Chinn, R. 914), payable \$4,800,000.00 in cash and the balance in annual instalments of \$900,000.00 with interest at the rate of $4\frac{1}{2}\%$ per annum (O'Donnell, R. 1634). Coleman and Casey outlined Kinzua's holdings, operations and financial affairs in general terms only, intentionally withholding detailed data, including timber cruise data, profit and loss and operating statements, pursuant to previous agreement between Kinzua's sales representatives that they would not negotiate with prospective purchasers until said representatives became satisfied that such purchasers were dealing solely as principals, were persons of integrity and responsibility and had sufficient operating capabilities and financial resources to purchase and operate Kinzua's properties (Joseph, R. 377-9; O'Donnell, R. 1634). Coleman and Casey stated that they would not permit inspection or investigation of Kinzua properties and financial affairs without the prior deposit by the prospective purchasers of \$600,000.00 in cash, subject to the condition that it would be returned to such purchasers if Kinzua's holdings and financial statement were not as represented, otherwise to be applied on the

purchase price or alternatively to be forfeited if the purchase was not completed (Joseph, R. 377; Chinn, R. 915).

(3) Following the meeting with Coleman and Casey, Joseph, Chinn and O'Donnell had a hurried, five-minute conversation prior to O'Donnell's departure by plane (Joseph, R. 381). During this conversation Joseph protested that the price asked for Kinzua was too high and unreasonable (Chinn, R. 921; O'Donnell, R. 1643); O'Donnell, however, stated that if Kinzua actually had the timber and assets as represented by Coleman and Casey the price might be all right (Chinn, R. 921; O'Donnell, R. 1643). Joseph suggested that "maybe some of the boys who had some tax money could get together and put up \$600,000.00 and that the deal could be sold to someone else", but O'Donnell rejected the suggested stating that he was a sawmill operator and as such was "not interested in peddling sawmills." (O'Donnell, R. 1643-5; Chinn, R. 924-5). Although Joseph suggested that some of his Chicago acquaintances might be interested in a deal of this kind he did not state or otherwise indicate who they might be, nor the amounts they might invest, if any, either individually or collectively (Joseph, R. 556; O'Donnell, R. 1645-6). Joseph merely stated that he would let O'Donnell know if any of them became interested (O'Donnell, R. 1645). O'Donnell inquired of Joseph what Terman's interest in Kinzua might be and Joseph told O'Donnell he was simply a friend of Joseph's and Needleman's and that there was no need to worry about him. Joseph did not advise O'Donnell or Chinn that Terman was expecting any commission from Kin-

zua's purchasers or otherwise (O'Donnell, R. 1646-7; Chinn, R. 921-4).

(4) The information which Joseph, Chinn and O'Donnell had, either individually or collectively, with respect to Kinzua following the meeting on November 19, 1952 with Coleman and Casey, was wholly insufficient for any of them to determine whether the purchase of Kinzua's stock was desirable or even feasible (O'Donnell, R. 1754).

(5) At no time, either before, on or after November 18 and 19, 1952, did Joseph request that O'Donnell investigate Kinzua or negotiate for the purchase of its stock or the financing thereof; nor did O'Donnell undertake or consent, gratuitously or otherwise, to so investigate or negotiate for the purchase of said stock or the financing thereof. Neither Joseph nor O'Donnell became or intended to become the agent of the other in any respect whatever; nor did either of them intend to be bound by the acts of the other, in any respect whatsoever. Neither Joseph nor Chinn nor O'Donnell made or entered into any understanding, agreement, representation, promise, commitment or undertaking, either written or oral, express or implied, with any of the others; nor did any of them intend so to do. None of them in fact entrusted or reposed confidence in any of the others insofar as Kinzua was concerned; nor did any of them believe or have reason to believe that any of the others did so. Joseph, O'Donnell and Chinn each considered their Portland meetings and their subsequent discussions to be exploratory in nature only; and neither O'Donnell nor Chinn ever had a meeting of the

minds with Joseph or any agreement or course of action or otherwise with respect to Kinzua. Neither Joseph, O'Donnell nor Chinn was bound, either expressly or by implication, to any course of action or conduct; and none of them intended so to be (O'Donnell, R. 1643-50, 1653-5; Chinn, R. 919-28).

VI.

(1) On or about November 26, 1952 O'Donnell and Chinn, together with O'Donnell's attorney and accountant, met with O'Donnell bankers, to canvass the possibility of obtaining more information concerning Kinzua, its assets and financial condition, without the prior deposit of \$600,000.00 (O'Donnell, R. 1665-9; Chinn, R. 938-42, 945-9; Dunn, R. 1058). As the result of said meeting, A. R. Munger, President of Seattle-First National Bank, O'Donnell's bank, contacted officers of the First National Bank of Portland, Kinzua's Portland bank, and a meeting with the officers of the Portland bank was subsequently held on December 9, 1952 (Dunn, R. 1021-2, 1062-3; O'Donnell, R. 1681-4).

(2) On his way back to his home in Chicago from his vacation at La Quinta, California, Joseph met with Terman, Gold, Needleman and Coleman (who was returning from a trip to San Diego) at Gold & Needleman's office in Beverly Hills, California, on November 29, 1952 (Joseph, R. 390-5). Coleman, however, supplied no additional information with respect to Kinzua, nor did he waive the requirement of a cash deposit of \$600,000.00 as a condition precedent to an inspection of Kinzua's holdings and operations and to supplying detailed information (Joseph, R. 518-19; Ter-

man, R. 1244). During this meeting a call was made to O'Donnell, during which Coleman told O'Donnell that he was willing to confer further with O'Donnell and Coleman suggested that O'Donnell and the defendants Wyman come to Portland to meet with Coleman and Casey (Joseph, R. 396-7; O'Donnell, R. 1673-4).

(3) On December 3, 1952, O'Donnell and Chinn together with the defendants Wyman met with Coleman and Casey in Portland (O'Donnell, R. 1676-9; Chinn, R. 950-2). At this meeting O'Donnell told Coleman and Casey that he would not pay \$600,000.00 to look at any patch of timber and a sawmill (Chinn, R. 953; O'Donnell, R. 1679). Coleman and Casey, however, did not waive the \$600,000.00 cash deposit as a condition to investigation and inspection of Kinzua's holdings and financial affairs (O'Donnell, R. 1679, 1685). At this meeting Coleman and Casey advised that they desired an "all cash" deal (O'Donnell, R. 1679, 1688). No proposals, agreements, commitments or undertakings of any kind were made by any party at the meeting (O'Donnell, R. 1679; Chinn, R. 957). O'Donnell told Joseph about the meeting (O'Donnell, R. 1681, 1707) and without O'Donnell's knowledge Joseph asked for and received through Terman and Needleman a report from Coleman about the meeting (Terman, R. 1246-7).

(4) As the result of arrangements made by A. R. Munger, President of the Seattle-First National Bank, O'Donnell, together with his bankers, A. R. Munger and Clayton Watkins, Vice-President of the Seattle-First National Bank, and O'Donnell's attorney, Bry-

ant R. Dunn, and O'Donnell's accountant, Paul Nielsen, met with officers of the Portland First National Bank, Kinzua's bankers, on December 9, 1952 (O'Donnell, R. 1681-4; Dunn, R. 1021). The purposes of the meeting were to get more information about Kinzua and to persuade Kinzua's representatives to permit an inspection of its properties and operations without the prior deposit of \$600,000.00 by demonstrating to Kinzua bankers, that O'Donnell, McLellan (at the time a potential investor) and the defendants Wyman were responsible, and that they had ample resources to handle Kinzua's purchase and to operate its properties in the event of purchase (O'Donnell, R. 1684, 1698; Dunn, R. 1021-2). Following the meeting, Don Silverthorne, Vice President of the Portland First National Bank and Coleman's banker, suggested that O'Donnell and his party remain in Portland overnight to see Coleman (O'Donnell, R. 1694; Dunn, R. 1022-3). Following conferences on December 10, 1952 among Coleman, Silverthorne, Munger and O'Donnell, Coleman gave O'Donnell permission to inspect Kinzua's properties without the prior deposit of \$600,000.00 (O'Donnell, R. 1698; Dunn, R. 1024) but he continued to withhold financial and operating statements and other detailed data (O'Donnell, R. 1852-3).

(5) Upon O'Donnell's return to Seattle he reviewed with Joseph the occurrences of the December 9 and 10, 1952 meetings at Portland by telephone (Joseph, R. 403; O'Donnell, R. 1742-3). Either then or shortly thereafter O'Donnell outlined or caused to be outlined to Joseph in a general way a possible plan of operation

of Kinzua whereby the corporation would be dissolved and its assets distributed to the individual purchasers (O'Donnell, R. 1709; Joseph, R. 407). This information was furnished to Joseph at his request to provide him with "ammunition" to approach possible Chicago investors (O'Donnell, R. 1710; Dunn, R. 1009-14). O'Donnell also told Joseph that O'Donnell was arranging to investigate Kinzua's operations at Kinzua, Oregon with one Ivan Kesterson, an experienced lumber and timber operator (Joseph, R. 403-4; O'Donnell, R. 1744); Kesterson was financially able to invest substantial sums in Kinzua on his own behalf as a principal and could participate in the management as an operator (O'Donnell, R. 1769-70).

VII.

(1) On December 15, 16 and 17, 1952 O'Donnell and Ivan Kesterson visited Kinzua (O'Donnell, R. 1762-8), together with D. E. Wyman and inspected a portion of Kinzua's lowlying timber and its sawmill and factory operations (O'Donnell, R. 1764-8), but inclement weather conditions precluded inspection of Kinzua's main bodies of timber (O'Donnell, R. 1765, 1773). The timber inspected appeared to be short-bodied, black knotted and bug infested (O'Donnell, R. 1770-3, 1784-5). O'Donnell was of the opinion that a substantial increase in the mill's production would be required to service the proposed purchase which increase would in turn require extensive changes in the mill's lay-out involving substantial expenditures, and drastic shifts in personnel which, potentially, was or could be the source of labor troubles (O'Donnell, R.

1784-6). Kesterson determined not to participate in Kinzua, either as an investor or operator or otherwise (O'Donnell, R. 1775-7).

(2) To assure the success of the Kinzua venture, particularly under the conditions above outlined, the services of a capable and experienced timber and saw-mill operator were required on the ground at Kinzua (O'Donnell, R. 1796). O'Donnell knew that Kesterson had determined not to participate in Kinzua (O'Donnell, R. 1775-7). When O'Donnell returned to his home in Seattle following his inspection of Kinzua's properties, his wife, who for many years suffered chronically from migraine headaches accompanied by periods of extreme anxiety and depression, was acutely ill and was in a highly and dangerously depressed condition which required him to be up with her most of the night of December 18, 1952 (O'Donnell, R. 1924-30, 1937). Under the circumstances O'Donnell determined not to pursue the Kinzua matter (O'Donnell, R. 1796). On the morning of December 19, 1952 O'Donnell called Coleman and so advised him (O'Donnell, R. 1777-9). During this call O'Donnell told Coleman that he was sorry he had taken up so much of Coleman's time; O'Donnell also told Coleman that he had reason to believe that Georgia Pacific was interested in timber properties such as Kinzua's and that O'Donnell would be glad to bring it to the attention of Georgia Pacific if Coleman wanted him to do so (O'Donnell, R. 1779); and Coleman said he would appreciate O'Donnell so doing, and a few days later he did so (O'Donnell, R. 1779-83, 1938-9).

(3) During a telephone conversation with Joseph on December 19 or 20, O'Donnell told Joseph what he and Kesterson had observed and discovered during his investigation of Kinzua, including the changes required to increase the mill's production to the extent necessary to service the purchase price and the risks incident thereto (Joseph, R. 434, 538-40; O'Donnell, R. 1783-6); O'Donnell further advised Joseph that he had determined not to pursue the Kinzua matter (O'Donnell, R. 1783-4). Neither during this conversation nor at any other time was there any agreement, understanding or commitment between Joseph and O'Donnell that they were to call or otherwise contact each other (O'Donnell, R. 1797). O'Donnell's determination not to participate in Kinzua's purchase was definite and complete and he so advised Joseph, and such determination was made in good faith. O'Donnell made no misrepresentation, consciously or otherwise, of any kind with respect to Kinzua or O'Donnell's intention with respect thereto; O'Donnell did not deceive or mislead Joseph in any way, nor did he intend so to do (O'Donnell, R. 1783-6, 1789-97; Dunn, R. 1033-4).

(4) On December 20, 1952 Joseph had a conference call by long distance telephone with Terman and Needleman in Los Angeles, in which the preceding phone call between O'Donnell and Joseph was discussed (Joseph, R. 572-6; Terman, R. 1358-61). At this time Joseph suspected that O'Donnell was attempting to "shake him out of" the Kinzua purchase (Terman, R. 1363-4; Joseph, R. 589). On December 26, 1952 Joseph called Coleman in Seaside (Joseph,

R. 547-9). Joseph did not thereafter contact or talk to Coleman (Joseph, R. 531, 644, 497).

VIII.

(1) On December 30, 1952 Joseph called upon A. C. Allyn, chairman of the board of A. C. Allyn & Co., Inc., Chicago investment bankers, and told him that the Kinzua properties were available for purchase (Joseph, R. 447-9; Allyn, R. 2871). Joseph gave Allyn the brochure of Kinzua, Exhibit 121, and a pencil memorandum (Allyn, R. 2872-3, 2880). Joseph told Allyn that A. R. Munger, President of Seattle-First National Bank, was familiar with the matter, but he did not mention O'Donnell to Allyn by name or otherwise (Allyn, R. 2873, 2877). Joseph did not tell Allyn what Joseph's interest in Kinzua was; nor was the matter discussed (Allyn, R. 2877). Joseph did not tell Allyn that either Joseph or anyone else was interested in participating in Kinzua's purchase (Allyn, R. 2881). The meeting between Allyn and Joseph did not exceed fifteen minutes in length (Joseph, R. 451) and there was no discussion between them concerning Joseph's interest (Allyn, R. 287). Allyn would only be interested in Kinzua as an equity investor (Allyn, R. 2877).

(2) At A. C. Allyn's direction, Douglas Casey, President of A. C. Allyn & Co., Inc., called A. C. Allyn & Co.'s northwest representative, W. M. Marshall, in Spokane and directed him to investigate Kinzua (Marshall, R. 3349-51).

(3) On the same day Marshall from Spokane called A. R. Munger who referred him to O'Donnell as being familiar with the subject (Marshall, R. 3350). Mar-

shall then called O'Donnell and told him that Joseph had referred Kinzua to A. C. Allyn and that Marshall had been directed to investigate the matter. Marshall made arrangements to meet O'Donnell thereafter in Seattle (O'Donnell, R. 1803-4).

(4) On January 5, 1953 O'Donnell met with Marshall in O'Donnell's office in Seattle (O'Donnell, R. 1804; Marshall, R. 3351). O'Donnell gave Marshall such information as he had about Kinzua and its purchase (O'Donnell, R. 1804-7). O'Donnell told Marshall that the timber had not been adequately inspected, nor could it be until the spring (Marshall, R. 3352), and that it was not feasible until then to determine the desirability of the purchase (Marshall, R. 3352). O'Donnell also told Marshall that he was going to Palm Springs with his family, that he was going to forget about Kinzua until his return late in March, and that upon his return he would contact Marshall if he were interested at the time (O'Donnell, R. 1808-9).

(5) Due to A. C. Allyn's interest as a possible equity investor and the improved physical condition of his wife, O'Donnell's interest in Kinzua became somewhat revived (O'Donnell, R. 1814, 1817, 1826-7). In early January, O'Donnell met Stuchell, an experienced timber and sawmill operator, and told him about Kinzua. O'Donnell asked Stuchell if he would be interested in Kinzua, both as an investor and as an operator (O'Donnell, R. 1424-7, 1826-7). Stuchell stated that he might be interested if he liked the deal after investigation (O'Donnell, R. 1426-7).

(6) On January 5, 1953 O'Donnell called Joseph in

Chicago and inquired of Joseph concerning Allyn's interest in Kinzua (Joseph, R. 554-5; O'Donnell, R. 1809). Joseph told O'Donnell that he had told Allyn about Kinzua (Joseph, R. 555). During either this conversation or one on January 9, 1953, O'Donnell told Joseph that he (O'Donnell) was "lukewarm" about Kinzua and that he was going to Palm Springs for a vacation (Joseph, R. 556-7; O'Donnell, R. 1810-11). O'Donnell told Joseph that O'Donnell and others around Seattle could easily get together \$2,500,000.00 to participate in Kinzua's purchase and O'Donnell specifically inquired about Joseph's interest in Kinzua (O'Donnell, R. 1810-11). Joseph replied that whatever interest he might have in Kinzua would be with the Allyn group (O'Donnell, R. 1811), and Joseph requested that O'Donnell cooperate with Marshall and supply him with such information as O'Donnell had (Joseph, R. 557-8). Joseph did not then (or in fact thereafter) say or otherwise indicate that he would invest any money; nor did he say that any other persons might invest in Kinzua (Joseph, R. 555-6).

(7) Joseph received a letter, dated January 7, 1952 (Exhibit 46) from the La Salle National Bank quoting the following excerpt from the January, 1953 issue of Banking, published by the American Bankers Association:

"In the Pacific Northwest trade area, there is a rather definite slackening in the tempo of business. In Seattle, the business level is sustained by the tremendous activity at the Boeing Airplane Company; nevertheless, many reliable barometers are trending downward. The same general condi-

tion is indicated in the Oregon territory. In that case, conditions in the lumber and plywood industry are a major factor. The plywood industry has a far more productive capacity than the present and prospective demand seems to justify and to all appearances the lumber and plywood business has some rather rough times ahead." (Exhibit 46; Joseph, R. 657-9)

IX.

(1) O'Donnell and his family left for Palm Springs on January 19, 1953, and neither he nor they returned to Seattle until March 23, 1953 (O'Donnell, R. 1939-41).

(2) While O'Donnell was at Palm Springs, Carl Coleman, J. F. Coleman's brother, invited O'Donnell to visit him and J. F. Coleman, who was coming to Shadow Mountain shortly (O'Donnell, R. 1818-21). On February 26, 1953 O'Donnell from Los Angeles called Joseph in Chicago and told him that O'Donnell was going to visit with J. F. Coleman at Palm Springs (Joseph, R. 453-4; O'Donnell, R. 1821, 1825). On February 27, 1953 Joseph sent a letter to O'Donnell reading as follows:

"Dear Harry:

"It was nice to talk with you on the phone and learn that you still have enough pep to consider operations such as we talked about on the phone, which makes me believe that your rest at Palm Springs has done you a great deal of good.

"Thought you might be interested in the photostatic copy hereto attached." (Exhibit 52; Joseph, R. 456)

The photostatic copy referred to was of the letter of January 7, 1953 from the LaSalle National Bank to

Joseph quoted in paragraph VIII(7), *supra* (Joseph, R. 456-8).

(3) During the last of February or the first few days of March, 1953, O'Donnell, together with Max A. Wyman (father of the defendants Wyman), visited with J. F. Coleman, and his brother and son, Carl Coleman and Mike Coleman at Palm Springs (O'Donnell, R. 1827-8). At the meeting Wyman said he would like to have W. H. Price, a timber engineer, then employed by the Wymans, look at the timber (O'Donnell, R. 1830, 1835-6) and J. F. Coleman agreed to advise O'Donnell when the weather would permit inspection of the timber which Coleman later did (O'Donnell, R. 1832-5).

(4) During the latter part of March, 1953 Price spent several days inspecting Kinzua's timber holdings and made a favorable oral report with respect thereto (O'Donnell, R. 1836-9). O'Donnell then decided to actively investigate the feasibility of Kinzua's purchase (O'Donnell, R. 1839-43); and shortly thereafter Stuchell, the three Wymans and O'Donnell, indicated their possible interest in each investing \$500,000.00 in Kinzua's purchase if further investigation showed that the purchase was feasible and desirable and if favorable terms of purchase could be negotiated (O'Donnell, R. 1836-44, 1947-8).

(5) On March 30, 1953 O'Donnell called Marshall in Spokane and told him that Price had made a favorable report concerning Kinzua's timber and that he would take a further look at Kinzua (O'Donnell, R. 1839-40; Marshall, R. 3354).

(6) On March 31, 1953 O'Donnell called Joseph in

Chicago and told him that Price had made a favorable report with respect to Kinzua's timber and that O'Donnell and others were going to go ahead and look the whole Kinzua deal over (O'Donnell, R. 1840-1, 1947-8), and he again indicated that he, the three Wymans and Stuchell each might put a half million in the Kinzua purchase and others not yet talked to probably would make more available (O'Donnell, R. 1948). Joseph reiterated that his interest was with the Allyn group and told O'Donnell to do his "business with Marshall" (O'Donnell, R. 1841, 1867-8, 1947-8). No arrangements were made during the conversation or subsequently for further discussions between Joseph and O'Donnell (O'Donnell, R. 1841). O'Donnell had reason to believe and did believe that the only interest Joseph then or thereafter had with respect to Kinzua was with the Allyn group exclusively (O'Donnell, R. 1867-8, 1882-3, 1947-8), and neither Joseph nor O'Donnell thereafter contacted or attempted to contact each other until after Kinzua's sale to the defendants was completed (Joseph, R. 467-8; Admitted Fact XXIV, R. 159-60).

X.

(1) On April 2, 1953 O'Donnell called Coleman and made arrangements to inspect Kinzua with Marshall, Lambert (a consulting engineer retained by A. C. Allyn & Co.) and Stuchell (O'Donnell, R. 1949-50; Marshall, R. 3354). On April 9 and 10, 1953 O'Donnell and Stuchell inspected Kinzua, but Marshall and Lambert did not join in the inspection because of conflicting engagements of Lambert (O'Donnell, R. 1950-1; Marshall, R. 3354-5).

(2) At the request of Coleman and Casey, O'Donnell called Marshall in Spokane on or about April 15, 1953 to determine whether Allyn was really interested in Kinzua (O'Donnell, R. 1849, 1951-2) and Marshall advised O'Donnell that some of the partners of A. C. Allyn & Co. and some of their clients were interested in buying undivided interests in timber and that Marshall was certain that Allyn was interested, and O'Donnell so advised Coleman and Casey (O'Donnell, R. 1849, 1951-2).

(3) On April 21, 1953 Marshall and O'Donnell met with Coleman and Casey in Portland (O'Donnell, R. 1852, 1952; Marshall, R. 3355-6). It was indicated to Coleman and Casey at the meeting that O'Donnell and associates wanted to take more than 50% of Kinzua's stock and that the remainder would be taken by partners of A. C. Allyn & Co. and a few of their clients (Exhibit 564; O'Donnell, R. 1880-2; Marshall, R. 3359-60, 3372-3). At the meeting Marshall advised Coleman and Casey that his people were interested in the Kinzua purchase and he requested financial and earning statements which for the first time were supplied to him and O'Donnell (O'Donnell, R. 1852-3; Marshall, R. 3360, 3373-5; Exhibit 564). Coleman and Casey advised Marshall and O'Donnell that Kinzua's representatives had arrangements to meet with other prospective purchasers on May 4, 1953 and Coleman and Casey demanded that they be given a definite decision on or before that date as to whether Allyn seriously intended to negotiate for Kinzua's purchase (O'Donnell, R. 1952-3; Exhibit 564). Marshall agreed to obtain a definite statement of

Allyn's position within 10 to 15 days (O'Donnell, R. 1953; Exhibit 564; Marshall, R. 3361). At the meeting arrangements were made for Marshall to inspect Kinzua's properties but the inspection was in fact never made (Marshall, R. 3361-3). On April 22nd Marshall contacted Coleman individually and discussed with him Kinzua's tax situation (Marshall, R. 3361).

(4) A. C. Allyn & Co. became involved in a financial transaction involving the Pacific Power & Light Company and because of this involvement Allyn determined, on or about April 27, 1953, to step aside from the Kinzua purchase and he instructed Marshall not to "further follow up the Kinzua Lumber Company deal." (Marshall, R. 3363, 3376-7; Allyn, R. 2875.) He advised Joseph that "we were getting out." (Allyn, R. 2875-6.) Joseph never asked Allyn the results of his investigation of Kinzua, nor did he ask that they be made available to him (Joseph, R. 633-4); nor did he communicate with O'Donnell, Chinn or Coleman (Joseph, R. 644, 634-6, 495-7).

(5) Marshall attempted to reach O'Donnell by telephone on April 27, 1953 to tell him of Allyn's decision, but was unable to do so at the time because O'Donnell was then out of the city (O'Donnell, R. 1954; Marshall, R. 3363, 3378-9). Marshall then called Coleman and advised him of Allyn's decision (Marshall, R. 3363, 3378). Coleman indicated to Marshall that Allyn's withdrawal would also eliminate O'Donnell (O'Donnell, R. 1444, 1989). Marshall, however, told Coleman that he thought O'Donnell could purchase Kinzua without Allyn, and Marshall asked Coleman to keep the door open for

O'Donnell until O'Donnell could contact him (Marshall, R. 3363, 3378).

(6) O'Donnell returned Marshall's call during the late afternoon or evening of April 27, 1953 and during the conversation Marshall advised O'Donnell of Allyn's decision to step aside from the Kinzua purchase because of involvement in the Pacific Power & Light utility consolidation (O'Donnell, R. 1440, 1954-5; Marshall, R. 3363-4; 3378-9). Marshall also told O'Donnell that he did not want Allyn's withdrawal to interfere with O'Donnell's right to purchase Kinzua and he advised O'Donnell that he was released completely and fully from any obligation to the Allyn group in relation to Kinzua (Marshall, R. 3363-4, 3379-80; O'Donnell, R. 1955).

(7) Following his long distance telephone conversation with Marshall, O'Donnell called Coleman on April 27, 1953 by long distance telephone and reported Allyn's withdrawal from Kinzua (O'Donnell, R. 1440, 1955). Coleman's reaction to O'Donnell's report was, "I guess this lets you boys out, doesn't it?" (O'Donnell, R. 1441, 1955.) O'Donnell requested additional time to confer with his Seattle associates and to contact other potential investors (O'Donnell, R. 1441, 1955). Coleman advised O'Donnell that he was about to enter into negotiations for Kinzua's sale with other purchasers and he demanded a prompt answer as to whether O'Donnell could and would go forward with Kinzua's purchase. Coleman requested that O'Donnell call back the next day, and O'Donnell agreed to do so (O'Donnell, R. 1441, 1955).

(8) On April 28, 1953 O'Donnell attempted to contact R. Howard Webster, a Canadian financier, to interest him in the Kinzua purchase (O'Donnell, R. 1435-6, 1439, 1441-2). Although O'Donnell was unable to reach Webster personally he did talk by long distance telephone to Webster's representative in New York on April 28th (O'Donnell, R. 1436). After talking to Webster's representative, O'Donnell called Coleman in Portland and informed him of his efforts to interest Webster in Kinzua (O'Donnell, R. 1957).

(9) O'Donnell talked to Webster in Montreal by long distance telephone on May 4, 1953 (O'Donnell, R. 1528-31, 1958), and arrangements were made for a meeting between the two in Los Angeles on May 9 and 10, 1953 at which time O'Donnell outlined the Kinzua matter to Webster (O'Donnell, R. 1531-2). O'Donnell suggested to Webster that Webster take 35% thereof, but this was rejected by Webster who desired to take either a minor percentage, not to exceed 10%, or 50% of the purchase (O'Donnell, R. 1552; Webster, R. 2657). Because of time limitations O'Donnell accepted Webster's proposal that Webster take 50% of the stock (O'Donnell, R. 1557, 1962). While Webster indicated a definite interest in the purchase of Kinzua he did not legally bind himself to participate therein and his future interest was subject to investigation of Kinzua's properties and the working out of other details made necessary by reason of the fact that he was a Canadian citizen (O'Donnell, R. 1557-8, 1958). On May 13, 1953 O'Donnell advised Coleman of the substance of his discussions with Webster and advised Coleman that nego-

tiations for the purchase of Kinzua could proceed with assurance that sufficient money was available to purchase the property (O'Donnell, R. 1557-8, 1958-9).

XI.

(1) Thereafter negotiations actively proceeded; the timber was cruised, and the purchase was consummated by the execution of purchase documents on August 17, 1953 (O'Donnell, R. 1959-61). During the course of negotiations the sellers for their own purposes voluntarily reduced the requested down payment from \$4,800,000.00 to \$3,345,000.00 (O'Donnell, R. 1961).

(2) O'Donnell originally planned to invest \$500,000.00 to be applied on the down payment or approximately 10% thereof (O'Donnell, R. 1948; Dunn, R. 1079). He eventually participated in Kinzua's purchase to the extent of 7% thereof, being some \$241,000.00 of the aggregate down payment made on the purchase price (O'Donnell, R. 1992). Webster, or those he designated, participated to the extent of 50% and Chinn to the extent of 1% (Exhibit 114).

(3) Joseph learned of defendant's purchase of Kinzua on August 27, 1953 (Joseph, R. 468, 641, 661; Exhibit 87). On August 27, 1953 Joseph wrote the following letter to O'Donnell (Joseph, R. 473; O'Donnell, R. 1898; Exhibit 90):

“Dear Harry:

“My attention has been called to a memorandum appearing in ‘The Timberman’ dated August 21, 1953, whereby you and others have purchased the Kinzua Pine Mills.

“I was a little surprised to learn this and would

appreciate your letting me know a little more about it.

“With kindest personal regards,

“Very truly yours,

“Harry Joseph”

On September 22, 1953 O'Donnell answered Joseph's letter of August 31, 1953 with the following letter (Joseph, R. 475, 639-40, 1898-9; Admitted Fact XXV, R. 160; Exhibit 93):

“Dear Harry:

“Please excuse my delay in answering your letter of August 31st. I have been out of town most of the time since the first of the month, and I am just getting around to catching up on some of my correspondence.

“When your group told me that they had lost interest in the Kinzua deal because of other utility deals, et cetera, that they had been interested in, I more or less dropped the matter and it lay dormant for a couple of months. Later on I ran into a fellow from Montreal whom I had been engaged in business with in the Elk Timber Company in Canada some years ago. I started talking to him about the deal and he expressed a desire to know more about it. He is a man of very large interests and was in a position to put up a good deal of cash. I then reinstituted negotiations with Coleman and ‘low and behold’ we made a deal.

“The way the lumber market has been behaving recently, I am not too sure we couldn't have made a mistake; however, time will tell.

“If we can ever be of service to your good company just let me know and I will put the sales-manager down there on your trail.

“With best personal regards,

“Very truly yours,

/s/ Harry

“Harry J. O’Donnell”

This letter was hurriedly written without the counsel of anyone, and it was not intended to be, nor was it misleading to Joseph (O’Donnell, R. 1899-1909; Joseph, R. 475-7, 639-41; Exhibits 94 and 96).

(4) Joseph did not answer O’Donnell’s letter of September 22, 1953 (Joseph, R. 640; Admitted Fact XXVI, R. 160); nor did he thereafter communicate or attempt to communicate with O’Donnell with respect to Kinzua’s purchase until May 11, 1955 when Joseph’s Seattle counsel sent their registered demand letter bearing date of May 11, 1955 reading as follows (Joseph, R. 652, 654, 661; O’Donnell, R. 1995; Exhibit 117):

“Registered Mail

“Return Receipt Requested

“Mr. Harry J. O’Donnell

Skinner Building

Seattle 1, Washington

“Dear Mr. O’Donnell:

“Our office, together with the firm of Pritzker, Pritzker & Clinton of Chicago, represents Mr. Harry Joseph of One North La Salle Street, Chicago, Illinois.

“According to our information, on or about October 15, 1952, Mr. Joseph submitted to you, in confidence, a proposal for the acquisition of all of the outstanding corporate stock of the Kinzua Pine companies, with the express understanding that in the event you decided to go ahead with the deal that both you and Mr. Joseph would advance fifty per

cent (50%) of the purchase price and each of you would acquire a fifty per cent (50%) interest in the stock, subject only to liability for a brokerage fee to Mr. Samuel E. Terman of Los Angeles, California.

“It is our further information that thereafter there were extensive negotiations for the acquisition of the Kinzua stock until approximately March of 1953, when you advised Mr. Joseph that you would communicate further with him when you were ready to go ahead. Mr. Joseph next heard that you had acquired the Kinzua stock without advising him or making any provision for his interest in accordance with the understanding which existed between you.

“The purpose of this communication is to formally advise you that it is the position of Mr. Harry Joseph that in acquiring the Kinzua stock you did so as trustee for his benefit to the extent of fifty per cent (50%) of all the capital stock. On behalf of Mr. Joseph, we are authorized to offer you one-half of the total cost price of the stock, and we request that you immediately furnish us with authentic evidence of the amount thereof, so that physical tender can be made to you forthwith.

“It is the further purpose of this communication to make formal demand on you to account fully for all of the earnings, accretions and increment of the Kinzua stock from the date of acquisition to the present time and to pay one-half thereof promptly to Mr. Joseph.

“Will you please respond to this communication not later than May 20, 1955.

“Very truly yours,

“Helsell, Paul, Fetterman, Todd & Hokanson

“By Thomas Todd”

(Exhibit 117)

XII.

(1) In his complaint Joseph contends that he intended to invest to the extent of 50% of the Kinzua purchase of \$12,000,000.00 (Complaint IV, R. 4-5). At the trial he testified he was representing only himself in the action (Joseph, R. 589); and both at his deposition and at the trial he testified that he had "planned" to invest \$250,000.00 in Kinzua (Joseph, R. 483, 676, 783). Prior to November 19, 1952 Joseph's largest, single investment (excluding his investment in a family corporation) was less than \$40,000.00 (Joseph, R. 677-8). During the November 19, 1952 meeting at Portland, Joseph was genuinely surprised at the amount of the \$12,000,000.00 purchase price for Kinzua announced by Coleman and Casey to Joseph, Chinn and O'Donnell (Chinn, R. 921; O'Donnell, R. 1643); and at that time Joseph, in speaking of his possible participation in Kinzua, said that at most he would be a "small minnow" in a "big sea," or words to that effect (O'Donnell, R. 1638-41; Chinn, R. 918-21).

(2) In 1952 and 1953 Joseph's net worth was approximately \$30,000.00 excluding his stock interest in the Joseph Lumber Company and valuing his real estate interest at cost (Fields, R. 1195-7, 1205-6). Joseph's assets consisted almost exclusively of undivided interests in unimproved real estate in and about Chicago and the ownership of 60 to 65% of the capital stock of the Joseph Lumber Company, a family corporation, of which he intended to retain control (Joseph, R. 701-2, 721). Joseph's cash in bank on December 31, 1952, was \$6,143.05 (Fields, R. 1194-5) and was substantially the same on December 31, 1953 (Fields, R.

1198). Joseph's life insurance was pledged to his bank to secure indebtedness approximately equally the cash surrender values of his policies (Joseph, R. 1687, 745). Joseph's liabilities during the Spring of 1953 included promissory notes payable in the amount of \$101,727.80 (Fields, R. 1197). In April, 1953 Joseph borrowed approximately \$30,000.00 from Samuel C. Horowitz to enable Joseph to participate in a real estate joint venture with Horowitz and others (Horowitz, R. 1485-7); subsequent to August 17, 1953 this loan was repaid from the proceeds of a partial liquidation of this investment (Horowitz, R. 1487).

XIII.

(1) At no time did Joseph agree, promise or offer to participate in Kinzua's purchase; nor did he represent or otherwise indicate that he would so participate. At no time did he advise or indicate the amount he might invest (Joseph, R. 555-6; O'Donnell, R. 1645-6, 1841, 1867-8, 1947-8).

(2) At no time did Joseph advise O'Donnell the names of any potential investors in Kinzua (other than Allyn); nor did he advise O'Donnell of any amount whatsoever that such investors, if any existed, might contribute to Kinzua's purchase (Joseph, R. 555-6; O'Donnell, R. 1948).

(3) At no time did Joseph or O'Donnell, either consciously or otherwise, make or assent to any offer, proposal, promise, agreement, commitment or undertaking of any kind with respect to Kinzua or otherwise; nor did either of them intend so to do. At no time did either Joseph or O'Donnell authorize or intend to au-

thorize the other to act for or on his behalf; nor did either of them assent or undertake, or intend to assent or undertake, to act on behalf of the other. Neither Joseph nor O'Donnell entrusted or placed any confidence in the other or intended so to do; and neither of them, intentionally or otherwise, acted or undertook to act with the other's interest in mind. In their conduct toward each other Joseph and O'Donnell dealt and intended to deal at arm's length with each other, and each retained and intended to retain full and unrestrained freedom of action in every respect (O'Donnell, R. 1985-6).

(4) Joseph placed no confidence in nor did he rely upon O'Donnell in any way (Joseph, R. 438-9, 441-6); on the contrary Joseph was suspicious of O'Donnell and he frequently checked upon O'Donnell's activities with Terman, Needleman and Gold, and through them with Kinzua's representatives. Joseph relayed information obtained from O'Donnell to Terman and through him to Needleman and Gold (Terman, R. 1363-4; Exhibit 43).

(5) In his relations with Joseph, O'Donnell at all times acted honestly, fairly, openly and in good faith. At no time did O'Donnell intentionally or otherwise, make any false or misleading statements to Joseph; nor did O'Donnell ever, intentionally or otherwise, misrepresent any fact or thing to Joseph or conceal any fact or thing from him. At no time did O'Donnell, intentionally or otherwise, mislead or deceive Joseph in any way, and Joseph, in fact, was never misled or deceived by O'Donnell in any respect (O'Donnell, R. 1985-6).

(6) All information and data which O'Donnell and the other defendants used in determining the desirability and feasibility of acquiring Kinzua or in negotiating for its acquisition were obtained solely and exclusively by O'Donnell and the other defendants by their own efforts and at their own expense, and Joseph, in fact, had no such information or data, except that originally provided him by Terman. At no time did plaintiff share or offer to share the expenses incident to the negotiations for Kinzua's purchase and to the inspection and investigation of its properties (Joseph, R. 611-12).

(7) If Joseph ever had any interest in Kinzua's purchase with O'Donnell it was known and understood at or about the end of March, 1953 by Joseph and O'Donnell that such interest was terminated and that at the very least O'Donnell believed and had the right to believe that it was (O'Donnell, R. 1811, 1841, 1867-8, 1947-8). Joseph was generally familiar with conditions, including price trends, in the lumber industry and was aware during the Winter, Spring and Summer of 1953 that the lumber industry was in a depressed condition (Exhibit 46; Joseph, R. 657-9). Lumber prices in fact were declining during the year 1953 (O'Donnell, R. 1993-4).

XIV.

Joseph was told by O'Donnell, on December 19, 1952, or Joseph had otherwise learned, that the purchase and ownership of Kinzua would require the purchasers to make the following-described changes of position:

(a) Pay, or incur the obligation to pay, a minimum purchase price of \$12,000,000.00 (Joseph, R. 378);

(b) Incur the risk of depressed market conditions and deflated prices for timber and lumber (Joseph, R. 657-9; O'Donnell, R. 1993-4);

(c) Incur the risk of bug infestation in timberlands with known propensity therefor (O'Donnell, R. 1770-1);

(d) Incur the risk of loss or damage to timberlands and/or mill and townsite from fire (O'Donnell, R. 1984);

(e) Double the production of mill to facilitate the servicing of the deferred purchase price, which would lead to the additional changes of position and problems following (Joseph, R. 655-6):

(1) Expenditures of \$250,000.00 or more, for additional dry kiln facilities (Joseph, R. 435-6, 654-5);

(2) Expenditures for new chipper and additional logging equipment (Joseph, R. 435-6);

(3) Expenditures for additional housing and for other facilities for increased number of personnel to handle increased production (O'Donnell, R. 1786);

(4) Shutting down of factory operation (O'Donnell, R. 1786);

(5) Transfer to new jobs or discharge of factory employees and surplus employees in other departments of Kinzua operations with possible resulting labor trouble (Joseph, R. 435);

(6) Employment of new personnel to facilitate double-shift operation, including the problems of

inducing qualified personnel to move to remote place such as Kinzua (O'Donnell, R. 1785, 1790-1).

(f) Incur the risks attendant upon dissolution of corporations, distribution of assets and assumption of liabilities, reorganization of operation and installation of new management (Joseph, R. 407-8).

XV.

O'Donnell, and the other defendants, incurred the following-described changes of position commencing with their purchase of Kinzua on August 17, 1953 and prior to May 11, 1955, the date of the registered letter addressed to O'Donnell by Joseph's attorneys, in which they asserted a right in Joseph to acquire 50% of Kinzua:

(a) Paid, or incurred the obligation to pay, a minimum purchase price of \$12,250,000.00. Each of the purchasers of Kinzua capital stock was required to execute a promissory note which rendered him jointly and severally liable for the unpaid portion of the purchase price, to-wit, \$8,820,000.00, limited, however, to the recapture of the Kinzua property (Exhibit 114);

(b) Incurred the risk of fluctuating market prices for timber and lumber. The lumber market in fact continued to decline and dropped off following defendants' purchase of Kinzua. It started rising again in 1954 and by 1955 prices were materially higher (O'Donnell, R. 1993-4).

(c) Incurred the risk of bug infestation and its spread. Defendants employed contract loggers who worked for two years "sanitizing" Kinzua virgin timber "by taking out the trees that were in trouble or

would cause trouble to other trees'' (O'Donnell, R. 1984-5).

(d) Incurred the risk of loss or damage to timberlands and/or mill and townsite from fire (O'Donnell, R. 1984). Defendants built roads into areas that had not previously been accessible for fire prevention and fire-fighting purposes. The sawmill sprinkling system was also improved to give greater protection to the mill and townsite (O'Donnell, R. 1984).

(e) Incurred risk of liability to third parties for fire damage arising out of spread of fire starting on Kinzua lands to neighboring lands (O'Donnell, R. 1984).

(f) Doubled the annual production of Kinzua from approximately 30,000,000 feet to approximately 60,000,000 feet (O'Donnell, R. 1918). Had Kinzua's production been continued at the same rate as that preceding its purchase, the operation would not have been sufficiently profitable to service the annual payments which the defendants were required to pay the sellers of the Kinzua capital stock as required by the Stock Purchase Agreement of August 17, 1953 (O'Donnell, R. 1983). The following-described additions, changes and improvements costing defendants approximately \$800,000.00 were made during the period commencing August 17, 1953 to the time Joseph's suit was commenced, to secure such increased production (O'Donnell, R. 1920):

(1) Additional dry kiln facilities were constructed (O'Donnell, R. 1982);

(2) Barking and chipping equipment was acquired and installed (O'Donnell, R. 1983);

(3) Twenty new houses were constructed for additional employees (O'Donnell, R. 1982), school-house in Kinzua was enlarged (O'Donnell, R. 1983) and additional miscellaneous facilities were constructed or expanded in the town site (O'Donnell, R. 1983);

(4) Log pond was enlarged (O'Donnell, R. 1983);

(5) Factory inventory was liquidated and factory shut down (O'Donnell, R. 1982);

(6) Additional lumber storage sheds were constructed (O'Donnell, R. 1982-3);

(7) Flow of lumber arrangements on the floor of the mill were revised (O'Donnell, R. 1982);

(8) Additional logging equipment was purchased (O'Donnell, R. 1983-4).

(g) Incurred the risks attendant upon the shutting down of the factory and other reorganization measures resulted in the reassignment of certain personnel and the discharge of others. The doubling of production necessitated the employment of substantial numbers of additional men for the logging crew and the sawmill crew. Labor unrest and related problems accompanied these personnel changes (O'Donnell, R. 1785-6, 1790-1, 1981-4).

(h) Incurred the risks attendant upon the dissolution of the Kinzua corporations, distribution of assets, reorganization of operation and new management (O'Donnell, R. 1918-19).

(i) O'Donnell and others purchasing Kinzua devoted their skill, time and efforts to the operations, reorganization, improvements and matters heretofore re-

ferred to under this Paragraph XV. Joseph was well aware that such time, skill and efforts were required and were being devoted to the matters mentioned (Joseph, R. 407).

XVI.

Joseph was aware that the prices for lumber products, and the value of stumpage fluctuates considerably from time to time (Joseph, R. 657). He was aware that prices were materially higher in 1954 and 1955 than in 1953, and Joseph believed that as of May, 1955 the Kinzua investment had been highly successful (Joseph, R. 659).

CONCLUSIONS OF LAW

I.

The oral memorandum decision of the court rendered in this cause on January 18, 1957 and appearing in the record herein at pages 2126 to 2147, inclusive, of the transcript, is by this reference incorporated into and made a part of these conclusions of law to the same effect as if such decision were fully set forth herein. All conclusions of law expressed by the Court in such memorandum decision are hereby expressly adopted and incorporated herein by this reference as if fully set forth in this paragraph.

II.

The law of the State of Oregon governs any alleged relationship between the plaintiff and the defendant, the creation and termination of any such relationship, and the statute of frauds regarding any claim arising out of any such relationship. The law of the State of

Washington applies with respect of any defense of laches interposed to any such claim.

III.

Plaintiff and defendant O'Donnell had no joint venture, agency, contractual, confidential, fiduciary or any other legal relationship with each other.

IV.

Plaintiff and defendant O'Donnell at all times dealt at arm's length with each other, and each of them was legally free to act solely in his own interests to the exclusion of the other and without any legal obligation to the other.

V.

Defendant O'Donnell did not mislead, deceive or defraud Joseph in any way; nor was plaintiff ever in any way misled, deceived or defrauded by defendant O'Donnell.

VI.

Defendant O'Donnell was not unjustly enriched either at plaintiff's expense or otherwise.

VII.

If any relationship ever existed between defendant O'Donnell and plaintiff, such relationship had terminated prior to August 17, 1953.

VIII.

If any relationship ever existed between plaintiff and defendant O'Donnell, it was known and understood by them that such relationship was terminated by March 31, 1953; and by reason of plaintiff's actions and inaction, defendant O'Donnell at the very least had reason to believe and did believe that such relationship, if any,

ceased to exist. Plaintiff is estopped to assert any claim against defendant O'Donnell or against any other defendant.

IX.

Plaintiff speculatively delayed asserting any claim against defendant O'Donnell or any of the other defendants during the period of the greatest hazard to defendants' investment and until the success thereof appeared to him to be certain. Plaintiff is barred by laches and he is estopped from asserting any claim against defendant O'Donnell or any other defendant.

X.

The claims which plaintiff asserts against the defendants other than O'Donnell are based as a matter of fact and law upon plaintiff's claim of liability against defendant O'Donnell. Since plaintiff has no lawful claim against defendant O'Donnell, the defendants other than O'Donnell are not liable to plaintiff and he has no valid or lawful claim against any of them.

XI.

Plaintiff's cause of action against the defendants and each of them should be dismissed on the merits with prejudice and with costs.



United States Court of Appeals For the Ninth Circuit

HARRY JOSEPH, *Appellant*,
vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN; M. H. WYMAN, and BRYANT R. DUNN, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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SOUTHERN DIVISION

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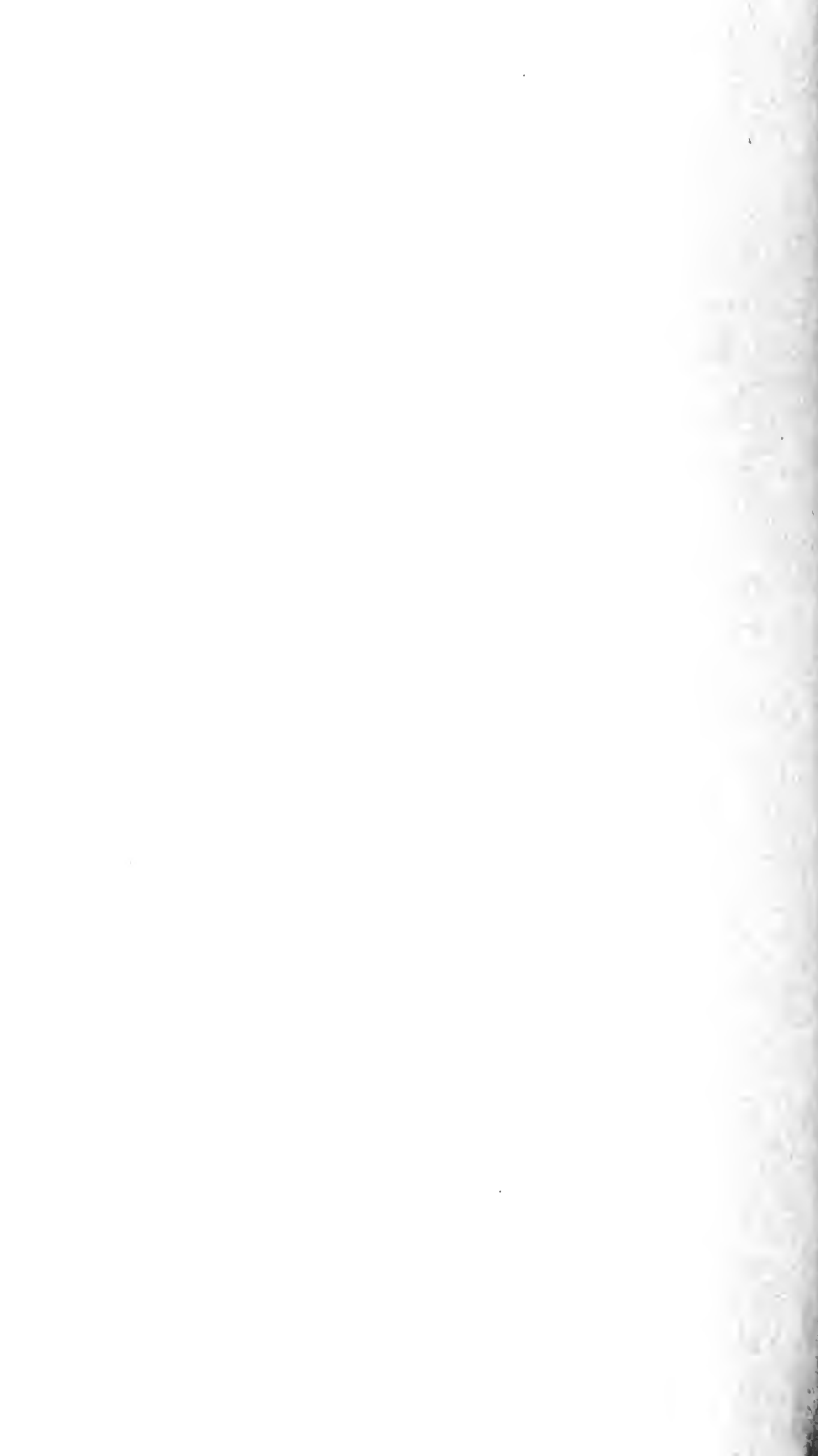
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United States Court of Appeals For the Ninth Circuit

HARRY JOSEPH, *Appellant*,

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN; M. H. WYMAN, and BRYANT R. DUNN, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT OF THE CASE

This is an action for “imposition of a trust.”¹ It is based upon appellant’s claim of the “existence of a joint venture agreement between plaintiff [Joseph] and Harry O’Donnell and his group . . . ”² Appellant, *assuming* that such a joint venture agreement existed, contends that O’Donnell violated fiduciary obligations arising thereunder. His sole basis for the imposition of

¹ Appellant’s Opening Brief, p. 1.

² *Id.* at p. 7.

a constructive trust is the alleged breach of such *assumed* obligations.

The jurisdiction of the district court was based upon diversity of citizenship³ and it was stipulated at the trial that the substantive features of the case were controlled by Oregon law.⁴ It was also stipulated that the issues of laches and speculative delay were to be determined by Washington law.⁵

Prior to the actual trial in the court below the trial judge, the Hon. George H. Boldt, signed an order separating the trial of the issue of whether O'Donnell was liable to Joseph from the trial of the issues of whether the other appellees were liable to him.⁶

The initial issue in the court below was whether as a matter of fact an agreement of joint venture, express or implied in fact, did or did not exist between Joseph and O'Donnell. For if no such agreement existed *as a matter of fact*, no fiduciary obligations could arise *as a matter of law*. In such case there would be no fiduciary obligations for O'Donnell to breach and Joseph's action would automatically fail. Thus in the first instance the resolution of the case depended upon a *choice between conflicting fact premises, i.e., whether in fact a*

³ Findings of Fact I (R. 246), Admitted Fact I (R. 154).

⁴ Colloquy (R. 944-5), Preamble to Findings of Fact (R. 245).

⁵ Appellant's Opening Brief, p. 85.

⁶ Order for Separate Trial of Issue and Limitation of Scope of Discovery Proceedings (R. 135, 136). Since none of the defendants, except O'Donnell, had any direct relationship with Joseph, their liability to him could arise, if at all, only through O'Donnell; and if O'Donnell, himself, was not liable to Joseph it would follow that none of the other defendants would be liable to him. Cf. Conclusions of Law X, (R. 282). That is the reason the court separated the trial of issues and ordered the issue of O'Donnell's liability to be tried first.

joint venture agreement did or did not exist between Joseph and O'Donnell. Joseph claimed it did; O'Donnell, it did not. Therein lay the crux of the matter.

The trial court's determination of *which* fact premise was credible necessarily was based upon the record made in the trial below.

The trial commenced on September 24, 1956, and continued through October 5, 1956 (R. 306-1573) when, due to prior commitments of the trial court, it was adjourned (R. 1573). It reconvened on November 21, 1956 and continued through November 27, 1956 (R. 1573-2048) when appellant rested (R. 2035). The trial of appellant's case consumed 14 days of actual trial, during which 10 witnesses testified in person and 18 depositions (including 6 of witnesses who testified in person) and some 340 exhibits were admitted in evidence. Appellant Joseph testified for some 4 days and his testimony covers some 475 pages of the printed record. Appellee O'Donnell also testified for some 4 days and his oral testimony covers approximately 524 printed pages. Appellee Chinn testified for almost 2 days, as did the witness Samuel Terman⁷ and their testimony consists of approximately 212 and 232 pages, respectively. The entire record herein consists of 9 printed volumes, aggregating 4,266 printed pages of which approximately 1710 consist of oral testimony, interspersed, of course, with usual colloquy.

At the close of appellant's case, the appellees made their motions to dismiss under rule 41(b), Federal

⁷Terman had a direct interest in the outcome of the case; he claimed a \$600,000 broker's fee by an agreement with Joseph, the collection of which depended upon Joseph's success in this case.

Rules of Civil Procedure (R. 2035-6). The trial court indicated that it desired to give them careful consideration.⁸ Appellant's counsel stated he was "in accord with your [the court's] thinking on that point"⁹ (R. 2039); but he asked for 40 days additional time to organize the "vast amount of evidence and exhibits" so that he could "present a printed document . . . with suggested findings of fact related to the evidence, and analyze the propositions of law with an attached brief" (R. 2039-41). Because of counsel's request the court

⁸ The trial court said (R. 2037-8) :

"Ordinarily, on a motion for dismissal at the end of the plaintiff's case, I somewhat summarily dispose of the motion with the view of hearing all the evidence. This case, however, is extraordinary in several particulars.

"In the first place, most, if not all, of the adverse parties have been interrogated at very great length and in great detail concerning the transactions in question, and, accordingly, the evidence of all the principals almost without exception, is before me.

"Rule 41-b provides, among other things, in an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment, and so on. The rule thus specifically authorizes the court in a non-jury case to weigh the evidence and find the facts, if the court feels that the evidence is in a posture for that. The cases under 41-b fully support the specific rules stated in the Rule 41-b that I have just read.

"For these reasons and others that are not now necessary to mention, I think it desirable that we have and hear full argument on the motion at this time. Now, recognizing that this is perhaps something you had not anticipated, I propose to suspend at this time if you desire it. If you do not desire it, we will go ahead, suspend at this time, and reconvene on Thursday and devote as much or as little of that day as may be necessary for a full presentation of whatever argument you each desire to make."

⁹ Mr. Clinton said (R. 2039) :

"I am very much persuaded that your Honor's view, that this case is properly one for a disposition at this point, is a sound one. I think your Honor is going to either decide one way or another based on the evidence in this case at this point, and nothing that you will hear hereafter will effect that ultimate judgment, so, therefore, I am in accord with your thinking on that point."

suspended further hearing until December 28, 1956 (R. 2046). It was stipulated between counsel for all parties that appellees would serve and file a written memorandum by December 12, and that appellant would do so by December 21 (R. 2048). Such memoranda were exchanged and filed as stipulated and oral arguments were heard on January 18, 1957 (R. 234-5).

On January 18, 1957, the trial court rendered its oral memorandum decision (R. 4246-63) granting appellees' motion to dismiss appellant's action "on the merits and with prejudice" (R. 4263). After granting extensions of time for filing proposed findings of fact and conclusions of law, as well as objections thereto, the trial court on March 22, 1957, rejected appellant's proposed findings and conclusions (R. 243-4) and took appellees' proposed findings and conclusions under advisement (R. 244). After making changes therein, the court signed formal findings of fact and conclusions of law (R. 244-82) and caused the same to be filed on June 3, 1957 (R. 282). The judgment of dismissal was signed and filed the same day (R. 283-4).

The trial court found that Joseph and O'Donnell, *in fact*, were not and never had been joint adventurers. Epitomized, the court's findings were:

1. That no express agreement existed between Joseph and O'Donnell;¹⁰
2. That there existed between them no agreement of joint venture, implied either from their actions alone or from their actions in combination with

¹⁰ Trial Court's Memorandum Decision (R. 4254-7) ; Findings of Fact V(1), V(5), XIII (R. 250, 252, 273-5).

their express words; contrariwise, the court found that their actions actually negated the existence of a joint venture agreement between them;¹¹

3. That if any relationship existed between them it was terminated, as a matter of fact, "at or about the end of March of 1953 . . . and that at the very least under the circumstances O'Donnell had a right to believe that it was [terminated]";¹² and
4. That Joseph as a matter of fact speculatively delayed asserting any claim against appellees for 20 months after Kinzua was acquired by them, during which period the venture was fraught with peril, and he in fact asserted his claim only after he was certain the venture "would prove profitable";¹³ accordingly, the court concluded that appellant was estopped, by reason of laches, to assert any claim against appellees, if any he had.

Since the court below found as a matter of fact that no agreement existed between Joseph and O'Donnell, it had no occasion to consider whether the "claimed" agreement was a valid *contract* of joint venture in point of law;¹⁴ in its oral memorandum decision it said:¹⁵

¹¹ Trial Court's Memorandum Decision (R. 4257-61); Findings of Fact V(1), V(5), XIII (R. 252-3, 273-5).

¹² Trial Court's Memorandum Decision (R. 4261, 4262). Therein the court said: ". . . whatever the relationship between Joseph and O'Donnell was—I am confident it was not joint venture or contract of any kind—but whatever it was, it was terminated at or about the end of March of 1953." (Emphasis supplied.) Cf. Findings of Fact XIII(7), (R. 275).

¹³ Trial Court's Memorandum Decision (R. 4262, 4263); Findings of Fact XIV, XV, XVI (R. 275-80).

¹⁴ We use the word, "agreement," advisedly; we do not use it as a synonym for "contract." This distinction is pointed out by Judge Learned Hand in *Great Lakes Transit Corp. v. Marceau*, 2 Cir. 1946, 154 F.2d. 623, 627: ". . . the parties can make agreements, but they cannot

“ . . . I am not going to discuss the matter of consideration or any other particular *negativizing contract*, because in my judgment the first essential element of the case, that is, *agreement* to make a joint purchase, is lacking.” (Emphasis supplied)

In its oral memorandum decision (R. 4246-63) the trial court explained *how* it reached its factual and legal conclusions; and in its formal Findings of Fact (R. 244-80) it set forth *chronologically* the *particular* facts found followed by the *factual inferences* drawn therefrom. For this court’s convenience the trial court’s oral memorandum decision is set forth under separate cover as Appendix I and its Findings of Fact and Conclusions of Law are set forth as Appendix II. In Appendix II we have documented the findings to the record itself, thereby demonstrating that each of them is supported by competent, substantial and credible evidence. So documented the Findings of Fact speak for themselves. We adopt them as our statement of facts herein.

Appellant states 6 points upon which he claims to rely upon this appeal:¹⁶

make contracts; only the law of the place where they agree can do that.” Cf. *Preston v. State Industrial Accident Commission*, 1944, 174 Or. 553, 149 P.2d 957, 961, wherein the Oregon Supreme Court said that the existence of a joint venture depended upon: “What is the *actual* character of the relationship intended *in point of fact* and does that relationship amount to a partnership *in point of law*?” (Emphasis supplied.) Since the trial court found that no *agreement* existed *in fact* it had no basis for determining whether the agreement appellant claimed to exist was a *contract* of joint venture *in point of law*. Elsewhere we shall show that the *agreement* appellant claims existed is not a *contract* of joint venture *under Oregon law*.

¹⁵ (R. 4259).

¹⁶ Statement of Points on Appeal (R. 287, 288); Appellant’s Opening Brief, p. 2.

1. The Findings of Fact do not support the Conclusions of Law and Judgment;
2. The Findings of Fact are "contrary to the evidence and clearly erroneous";
3. The evidence established a joint venture between Joseph and O'Donnell;
4. The court erred in dismissing plaintiff's action;
5. The court erred in granting defendant's motion to dismiss; and
6. The court erred in limiting plaintiff's discovery proceedings to the issue of the liability of defendant O'Donnell.

Point 6 is not argued at all in appellant's brief;¹⁷ and point 1, if argued at all, is not argued separately from other points. Points 2 through 5 are argued collectively. Basically, then, appellant makes but a single argument: That the trial court's findings of fact are contrary to the evidence and clearly erroneous.¹⁸

¹⁷ Cf. *Rystad v. Boyd*, 9 Cir. 1957, 246 F.2d 246, 248; *Peck v. Shell Oil Co.*, 9 Cir. 1944, 142 F.2d 141, 143.

¹⁸ Thus, in the last paragraph of his "Statement of the Case," appearing on page 7 of his Opening Brief, appellant says:

"This appeal followed in due course, based in large measure on the insufficiency of the facts to support the findings, and of the findings to support the judgment that there was no joint venture or that it was terminated, or that plaintiff was barred by laches. These findings, and the judgment based thereon, are urged to be clearly erroneous as contradicting the evidence, including many admissions of the defendants themselves."

SUMMARY OF ARGUMENT

The issues on this appeal, as in the court below, are fact issues. They require a determination, in the first instance of whether *as a matter of fact* Joseph and O'Donnell were or were not joint adventurers. The trial court found they were not. They require a further determination whether, if any relationship ever existed between appellant and O'Donnell, it had, *as a matter of fact*, been terminated. The trial court found that it had been. Finally, they require a determination of whether, *as a matter of fact*, appellant speculatively delayed asserting a claim against appellees. The trial court found that appellant had.

On this appeal appellant argues generally that the findings of fact of the trial court are contrary to the evidence and clearly erroneous, but he does not specify the particular finding or findings to which he objects.

For the court's convenience, we set forth under separate cover as Appendix I the trial court's memorandum decision explaining how it reached its factual and legal conclusions. As Appendix II we set forth the trial court's formal findings of fact and conclusions of law. In Appendix II we have carefully documented the trial court's findings of fact to the record itself, thereby demonstrating that all of them are supported by substantial, credible and competent evidence. The court's memorandum opinion and its findings of fact and conclusions of law are set forth under separate cover so that they may be more conveniently used by the court in connection with its own analysis of the record and of the briefs.

Since the findings are supported by substantial, credible and competent evidence, we think that appellant's appeal should be dismissed at this point without further consideration. Because of the nature of appellant's brief, however, we feel the court may desire further argument.

Under Section I of the brief itself, we review the Oregon law of joint venture. Therein we demonstrate that a joint venture relationship simply cannot arise by implication of law. Under Oregon law the relationship of joint adventurers is a definite, legally enforceable relationship, created only as a result of voluntary contract of the parties expressed or implied *in fact*. The joint venture contract here alleged to exist is a bilateral contract with each of the parties being both a promisor and a promisee. The requisites for a valid contract of joint venture are identical with those of other contracts. Under Oregon law the promises of the parties to create a bilateral contract of joint venture must be sufficiently definite with respect to essential terms that a court can determine what each promised. If essential promises are vague, indefinite or uncertain or if any essential term of the alleged contract is reserved for future negotiation or agreement no valid contract of joint venture is created. For the Oregon courts will not fill in the terms of the agreement for the parties if they have failed to do so themselves. And this is true with respect to implied *in fact* contracts as well. If the contract is to be implied in fact from the acts of the parties, the court must be able to determine definitely the obligations or promises of each, as well as each and every other element requisite to a valid bilateral con-

tract. Where, as here, the alleged contract is in its executory stages, a heavy burden of proof rightfully falls upon the party claiming its existence. In each case the basic question under Oregon law is whether or not the parties intended to and did make and assent to reciprocal promises, what the promises were, if made, and how the making of them was outwardly manifested by each party to the other.

In Section II, we demonstrate that the burden of proving the alleged contract of joint venture is upon the party asserting its existence. Where the alleged joint venture contract is claimed to be the basis for the imposition of a constructive trust, each and every element of that contract must be established by strong, clear and convincing evidence.

In Section III, we demonstrate that the findings of fact of the trial court, particularly where they are based upon conflicting evidence, are presumed to be correct and that this court should not in such case substitute its own findings for those of the trial court. Here the trial court's findings of fact were necessarily concerned with imponderables such as the intentions of the parties and factual inferences. These are fact findings pure and simple and, being supported by substantial competent evidence, they should not be disturbed. Under the decisions of this court and the Supreme Court of the United States, Rule 52(a), Federal Rules of Civil Procedure, applies with particular force to findings concerned with imponderables such as the intentions, designs and motives of parties with respect to acts and occurrences which took place three or more

years before the trial in the court below. In such case this court should not retry the case *de novo*.

In Section IV, we demonstrate that the appellant may not fabricate a legal issue out of the purely factual matters here involved by erroneously labeling evidence as “admissions,” “undenied evidence” and “documentary evidence.” The “documentary evidence” makes no mention of any agreement of any kind between Joseph and O'Donnell; hence such evidence is concerned solely with matters collateral to the existence or non-existence of a contract of joint venture. The matters which appellant's counsel label “admissions” are not admissions at all. Except for relatively unimportant details, entirely consistent with the *non-existence* of a joint venture contract, the matters labeled as “admissions” and “undenied evidence” are largely oral testimony of interested parties upon which appellant's counsel place their own erroneous interpretation. The testimony and evidence forming the basis of the claimed “admissions” and “undenied evidence” are entitled to no special sanction. They were subject to evaluation, or even rejection, by the trial court, and were required to be viewed by it in their proper setting together with all other evidence in the light of the credibility of the witnesses. And where, as here, they were evaluated by the trial court and entered into a finding of fact, that finding may not be disturbed unless clearly erroneous.

In Section V, and subsequent sections, we review the record made in the court below. We first point out that the keystone of appellant's case, which is the false as-

sumption of his counsel that an express contract of joint venture was created during appellant's and O'Donnell's November 18, 1952 meeting in Portland, is missing because the credible evidence demonstrates that no words were uttered or assented to creating an express contract.

Moreover, no contract of joint venture was created by implication from the conduct of appellant or O'Donnell, nor by a combination of both their words and conduct. Until they were able to learn what was for sale, neither could know whether he had any interest in negotiating for the acquisition of Kinzua. This knowledge of appellant and O'Donnell was not obtained during the purely exploratory meeting in Portland on November 19, 1952. O'Donnell did not acquire such basic preliminary information until mid-April, 1953, by which time appellant had advised O'Donnell that whatever interest he had was with A. C. Allyn, a Chicago investment banker. Appellant's lack of knowledge concerning Kinzua and his obvious financial inability to make his claimed investment interest completely belie his story of a Portland agreement or any subsequent joint undertaking with O'Donnell to acquire Kinzua.

We further discuss in Section V the relationship of appellant and his broker friend Terman. Terman has a direct interest in this lawsuit and his hearsay testimony and memoranda, organized, and in many instances created, for use in this case, are completely untrustworthy and discredited.

In Section VI, we analyze the claimed "admissions" of O'Donnell, the ballooned exhibits appearing at pages

59 and 60 of appellant's brief, and the documentary evidence which counsel claim support the existence of a joint venture. The so-called "admissions" of O'Donnell are not admissions at all, and the ballooned exhibits and appellant's other documentary evidence neither establish, nor tend to establish, the existence of a joint venture between appellant and O'Donnell. To the extent that they are relevant at all, they are concerned with collateral matters. The so-called documentary evidence, consisting of self-serving memoranda of Joseph, were not made contemporaneously with the events they purport to cover, and, for this and other reasons, are incredible and untrustworthy .

In Section VII, we demonstrate that neither O'Donnell nor the other appellees who were interested in Kinzua at the time of Allyn's withdrawal, were unjustly enriched, or otherwise benefited, by reason of Allyn's replacement by Webster.

In Section VIII, we demonstrate that if any relationship ever existed between appellant and O'Donnell with reference to Kinzua, it had terminated long prior to Kinzua's purchase by appellees. From December 30, 1952, when appellant discussed Kinzua with A. C. Allyn, appellant indicated no interest in Kinzua to O'Donnell, except such as he might with the Allyn group. Although he did not indicate clearly what that interest might be, Allyn had the impression that appellant was looking for a finder's fee or commission. In any event, appellant's actions and inaction from December 30, 1952, forward caused O'Donnell to believe,

and he did believe, that appellant had no interest in Kinzua independent of his interest with Allyn. When Allyn withdrew his interest in Kinzua, all interest of appellant ceased. Appellant is estopped to assert his present claim against O'Donnell or the other appellees.

In Section IX, we demonstrate that appellant speculatively delayed asserting any claim against appellees during the period of greatest hazard to their investment, and he in fact asserted a claim only after it was obvious to him that appellees' investment had proved to be successful. By reason thereof appellant's claim is barred by laches under Washington law.

In Section X we compare the credibility of appellant and O'Donnell. Despite the trial court's finding that O'Donnell was an entirely trustworthy witness, appellant's counsel continue their attempted vilification of him on this appeal. Because of the scurrilous nature of their attack, we believe it should not go unanswered. In this section we demonstrate that O'Donnell's testimony was honest and worthy of belief, and that his actions were honorable and forthright. The testimony O'Donnell gave at the trial was in all important aspects consistent with that given during the taking of his deposition. On the other hand, appellant's testimony at the trial varied in important aspects from that given at his deposition and was, as the trial court found, untenable and incredible.

Finally in point XI we demonstrate, *arguendo*, that even under appellant's version of the facts, no contract of joint venture existed between him and O'Donnell under Oregon law. Appellant's counsel's claim of

a contract of joint venture is based upon their own false assumptions and specious inferences drawn therefrom. The claimed promises upon which appellant's counsel rely to establish a contract of joint venture are wholly illusory and they are entirely too vague, indefinite and uncertain with respect to essential terms to create a contract of joint venture under Oregon law. They were, in fact, not promises at all.

ARGUMENT

I.

Analysis of Basic Issue Under Oregon Law

A. Basic Issue—Did Joseph and O'Donnell Enter Into a Contract of Joint Venture?

Despite the length of the record the issues of this case are quite simple if resort is made to basic principles. Joseph's action is based solely upon his claim of a breach of alleged fiduciary obligations arising from an *assumed* joint venture between himself and O'Donnell. But, as we heretofore pointed out, if that relationship did not exist, as the trial court found it did not, no fiduciary obligations could arise therefrom and hence there were none for O'Donnell to breach. The basic issue, then, is whether Joseph and O'Donnell did or did not occupy the relationship of joint adventurers with each other.

During the trial it was stipulated that this case, being one of diverse citizenship, was controlled by Oregon law (Colloquy, R. 944-5, Preamble to Findings of Fact, R. 245). Accordingly, the basic issue is whether

Joseph and O'Donnell were in fact joint adventurers under Oregon law.

Under Oregon law, as elsewhere,¹⁹ the legal relationship of joint adventurers “ . . . is the product of *voluntary contract* express or implied.” *Preston v. State Industrial Accident Commission*, 1944, 174 Or. 553, 149 P.2d 957, 961. If, in fact, there is no *voluntary contract* between the parties they are not joint adventurers. *Preston v. State Industrial Accident Commission*, *supra*; *Reed v. Montgomery*, 1947, 180 Or. 196, 175 P.2d 986; *Bogle v. Paulson*, 1949, 185 Or. 211, 201 P.2d 733; *Burnett v. Lemon*, 1948, 185 Or. 54, 199 P.2d 910. The *actual character* of the alleged relationship must be ascertained *as a matter of fact* before the *legal* relationship can be determined. In the words of the Oregon Supreme Court,²⁰ the question in each case where the existence of a joint venture is claimed is:

“What is the *actual character* of the relationship intended *in point of fact* and does that relationship amount to a partnership [joint venture] *in point of law*?” (Emphasis supplied)

¹⁹ 30 Am. Jur., Joint Adventures, §7, p. 943:

“As between the parties, although not necessarily as to third persons, a contract is essential to create the relation of joint adventures. The sine qua non of the relationship of joint adventure is a contract, express or implied. As a legal concept, a joint adventure is not a status created or imposed by law, but is a relationship voluntarily assumed and arising wholly *ex contractu*. As in contracts generally, the essence of a joint-adventure contract is that it binds the parties who enter into it, and, when made, obligates them to perform it, and failure of any of them to perform constitutes, in law, a breach of contract.”

²⁰ *Preston v. State Industrial Accident Commission*, 1944, 174 Or. 553, 149 P.2d 957, 960.

In this case the Oregon court uses the term “ ‘partnership’ as if inclusive of ‘joint adventure,’ ” because “the rules and principles applicable to a partnership relation govern and control the rights, duties, and obligations of the parties as to each other.” (At p. 960.)

B. Joint Venture Contract Cannot Arise by Operation of Law

Since, under Oregon law, a joint venture can be created only by a voluntary contract between the parties, a joint venture as between themselves can never arise by operation of law.²¹ *Burnett v. Lemon*, 1948, 185 Or. 54, 199 P.2d 910, 915; 30 Am. Jur., Joint Adventures, §7, p. 943; 48 C.J.S., Joint Adventures, §3, pp. 816, 817. Thus, even though a contract of joint venture may be implied as well as expressed, if such a contract is to be implied at all, it can be implied only as a matter of fact. For such an implied in fact contract is a true contract in every sense, and the elements requisite to its existence are identical to those of express contracts. 1 Williston on Contracts, Third Edition, §3, p. 11. Such an implied in fact contract is distinctly different from an implied in law, or quasi contract. Professor Williston points out:

“It is important to distinguish between quasi contracts and contracts implied in fact, . . . because of the difference in the legal relations which

²¹ In *Burnett v. Lemon*, 1948, 185 Or. 54, 199 P.2d 910, 915, the Oregon Supreme Court said:

“Here we are not concerned with a case wherein a third person is seeking to establish liability against a partnership by reason of the conduct of the alleged partners in holding themselves out to the public as having such relationship. The distinction between that case and the other one under consideration is thus clearly stated in *Watson v. Hamilton*, 180 Ala. 3, 60 So. 63:

“On the question whether the parties are partners inter se, the interest of no third person being involved, stronger proof is required to establish the partnership than when the question arises as between the alleged partners and third persons. A partnership as to third persons may arise by mere operation of law against the parties by way of estoppel, etc.; but as between the parties themselves it only exists when such is their actual intention.”

may be involved under a true contract and those imposed by law under the name of a quasi contract. Quasi contractual obligations are imposed by law for the purpose of bringing about justice without reference to the intention of the parties. . . . On the other hand, a true contract cannot exist, *however desirable it might be to have one*, unless there is a manifestation of assent to the making of a promise." (Emphasis supplied) 1 Williston on Contracts, Third Edition, §3a, pp. 12, 13.

We think appellant *assumes now* that on November 18, 1952 he intended to become a joint adventurer with O'Donnell, although neither he nor O'Donnell *then* did anything to commit himself to the other. From the *assumption* that Joseph *then* intended to become a joint adventurer with O'Donnell he *now concludes* that they *then* must have made mutual promises imposing fiduciary obligations on each to the other. And finally *assuming now* that such fiduciary obligations existed *then*, he reasons that he and O'Donnell must have intended to become joint adventurers in the first place, and hence a contract of joint venture should be *implied* to have been created *then*.

But this is reasoning by label.²² It assumes that the relationship creates the promises, not the promises the relationship.

²² Cf. *Las Vegas Machine & Engineering Works v. Roemisch*, 1950, 67 Nev. 1, 213 P.2d 319, 321:

" . . . we cannot determine the rights of the parties to this contract simply by giving it a name. [Citation.] As with other contracts, the intention of the parties (no rights of third parties being involved) must be determined from the instrument itself if this can be done. 'There is no principle of hermeneutics of peculiar application to articles of copartnership. They are construed by the ordinary rules for interpreting written contracts.' *Walker v. Patterson*, 166 Minn. 215, 208 N.W. 3, 7." (Emphasis supplied.)

C. Basic Requisites of Joint Venture Contract Same as Other Contracts

The basic requisites for the validity of a joint venture contract are no different from those of other contracts.²³ *Greenley v. Janesville Mills*, 7 Cir. 1953, 204 F.2d 526, 528; *Kislak v. Kreedian*, 1957, Fla., 95 So.2d 510, 515; *Mason v. Rose*, 2 Cir. 1949, 176 F.2d 486; 48 C.J.S., Joint Adventures, §3, p. 816, *et seq.* Nor are the requisites different because the alleged contract of joint venture is one to be implied in fact. *Kislak v. Kreedian*, 1957, Fla., 95 So.2d 510, 515. In such implied in fact contracts, as in express contracts, each element essential to the existence of a valid contract must be shown *to exist in fact*. The only difference is in the *method* of proof; and where, as here, the alleged contract if it exists at all, is in its executory stages, the quality and degree of proof as to each element must be clear and convincing. Thus the Florida Supreme Court said in *Kislak v. Kreedian*, *supra*:

“The Courts, including this Court, have held that while such contracts [of joint venture] may be expressed or *implied*, the use of the word ‘implied’ does not relieve one who alleges the existence of such a relationship of the burden of both alleging and proving that an agreement or contract supports the relationship *as well as every element*

²³ In *Greenley v. Janesville Mills*, 7 Cir. 1953, 204 F.2d 526, 528, the Seventh Circuit said:

“ . . . Recognizing the uncertainty of this contract, plaintiff argues that we must look upon it as a joint venture whereby the parties were to profit or to lose in equal proportions. *But we can apprehend of no reason why a joint venture agreement should lend itself to any different construction than that accorded any other contract.*” (Emphasis supplied.)

necessary to be embraced within the concept of a contract. Moreover, where, as in this case, the events and transactions which form the basis of the alleged relationship are not in writing, the burden of establishing the existence of such contract, including all of its essential elements, is indeed, as it should be, a heavy and difficult one. Business relationships are not customarily entered into in a casual manner. This is particularly true as to those involving the magnitude of that under discussion. The very fact that the agreement was not reduced to writing is evidence, however slight, that no such agreement actually existed. This is especially true in those cases where, as here, the alleged relationship is either in its executory stages or has not actually commenced to function to the extent that the actions of the parties themselves may tend to establish the validity of the assertion that such agreement existed.” (Emphasis supplied)

1. No promises, no contract

Stripped of extraneous verbage then, the simple issue in this case is whether each of the elements requisite to the creation of a valid contract exists as a matter of fact.

By definition, a “contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Restatement, Contracts, 1932, §1, p. 1. *The promise must exist as a fact before the contract can be declared; for without a promise there is no contract. It is the promise that creates the contract—not the contract, the promise.*

In this case the contract appellant claims existed

between Joseph and O'Donnell obviously was bilateral, requiring *mutual* promises between them, each being both a promisor and a promisee. Restatement, Contracts, §12, p. 10.

Concretely the first fact question is: *Did Joseph and O'Donnell make promises each to the other?* If the answer is that they did not, as the trial court found, no contract of joint venture was created. Hence, the parties were not joint adventurers and Joseph's claim automatically fails. In this posture of the case, discussion of any other question, factual or legal, becomes wholly academic.

On the other hand, if the answer is that Joseph and O'Donnell did make promises, each to the other, then it becomes necessary to determine as a matter of fact exactly *what* each of them promised. For while, by definition, promises by each to the other are essential to the existence of a bilateral contract, not all promises create such a contract; they may be vague and indefinite, illusory, gratuitous, lack mutuality, or may be insufficient otherwise to create a binding contract.

2. Exploratory negotiations do not create a contract of joint venture

Thus under Oregon law, as elsewhere, exploratory negotiations looking to the formation of a joint venture relationship in the future will not result in a present contract of joint venture. For to create a valid contract of joint venture there must be an outward manifestation that the minds of the parties have met upon all of the material terms of the supposed contract; their promises must show that both parties assented to the

same thing in the same sense. *Reed, et al., v. Montgomery*, 1947, 180 Or. 196, 175 P.2d 986, 996. If any material term is reserved for future exploration, negotiation, or agreement there is no contract between the parties until the term so reserved is agreed upon by the parties themselves; for the Oregon courts will not "fill out the agreement for the parties" where they, themselves, have failed to do so.²⁴ *Reed v. Montgomery*, 1947, 180 Or. 196, 175 P.2d 986, 997; *Slayter v. Pasley*, 1953, 199 Or. 616, 264 P.2d 444, 449; *Holtz v. Olds*, 1917, 84 Or. 567, 577, 164 Pac. 583, 586. And this is particularly true where, as here, large and complicated business and financial transactions are involved. *Reed v. Montgomery, supra*, p. 996; *Mason v. Rose*, 2 Cir. 1949, 176 F.2d 486; *Brown v. Bivings*, 1954, Okla., 277 P.2d 671; *Kislak v. Kreedian*, 1957, Fla., 95 So.2d 510; *Biothermal Process Corp. v. Cohu & Co.*, 1953, 283 App. Div. 60, 126 N.Y.S.2d 1, aff'd. 308 N.Y. 689, 125 N.E.2d 323; *American Mining Co. v. Himrod-Kimball Mines Co.*, 1951, 124 Colo. 186, 235 P.2d 804.

²⁴ In *Slayter v. Pasley*, 1953, 199 Or. 616, 264 P.2d 444, 449, the Oregon Supreme Court said:

"We should be hesitant about completing an apparently legally incomplete agreement made between persons *sui juris* enjoying freedom of contract and dealing at arms' length by arbitrarily interpolating into it our concept of the parties' intent merely to validate what would otherwise be an invalid instrument, lest we inadvertently commit them to an ostensible agreement which, in fact, is contrary to the deliberate design of all of them. It is a dangerous doctrine when examined in the light of reason. Judicial paternalism of this character should be as obnoxious to courts as is legislation by judicial fiat. Both import a quality of jural ego and superiority not consonant with long-accepted ideas of legistic propriety under a democratic form of government. If, however, we follow the urgings of the lessee in the instant matter, we will thereby establish a precedent which will open the door to repeated opportunities to do that which, in principle, courts should not do and, in any event, are not adequately equipped to do."

3. Mutual assent essential and must be manifested by each party to the other

Finally, not only must parties to bilateral contracts have made promises sufficiently definite to enable a court to determine what was promised by each and whether the promises made covered all the material terms of the contemplated agreement; additionally the promises so made must have been *outwardly manifested* by each party to the other. Thus in the Restatement of Contracts, §20, Comment A, it is said: "Mutual assent to the formation of informal contracts is operative only to the extent that it is manifested." And Professor Williston says, 1 Williston on Contracts, Third Edition, 1957, §22, pp. 46, 47:

"It is customarily said that mutual assent is essential to the formation of informal contracts, but it should be further stated that the mutual assent *must be manifested by one party to the other, and except as so manifested is unimportant. . . .* In the formation of contracts it was long ago settled that secret intent was immaterial, only *overt acts* being considered in the determination of such mutual assent as that branch of the law requires." (Emphasis supplied)

Thus to be effective, manifestation of assent by the promisor must be known to the promisee. Again Professor Williston says, *id.* at pp. 48, 49:

"Not only must assent to a contract be manifested by overt acts, but *promises in contracts must be made by manifestation of agreement moving from the promisor to the promisee. . . .* A promise *necessarily* implies either *communication* from the promisor to the promisee, or at least *some ac-*

tion which will normally *indicate to the promisee* the intent of the promisor." (Emphasis supplied)

Since the contract here claimed to exist is bilateral, with each party being both a promisor and a promisee, it was essential to its existence that the words or acts outwardly manifesting the assent of each have been communicated or made known to the other. Absent such communication or knowledge by either or both, there is, of course, no contract.

Applied here, this principle is by no means academic. Since there was no written agreement between Joseph and O'Donnell, the fact question of whether they did or did not assent to reciprocal promises to each other, either expressly or by implication from their conduct, must necessarily be determined from their own words and acts. In determining what these were, the court was largely dependent upon their own testimony and to a considerable extent that of Chinn, who was present in Portland when appellant's counsel claim an express contract was created between Joseph and O'Donnell. The rest of the record largely covers collateral facts concerned primarily with imponderables such as intentions of the parties and the credibility of witnesses.

As we hereafter show, the entire record, both that portion which bears directly upon Joseph's and O'Donnell's own words and acts as manifested to each other, as well as the portion dealing with collateral facts, fully supports appellees' position. Objectively evaluated it permits of only one conclusion—that no agreement was ever reached as a matter of fact between Joseph and O'Donnell.

For the most part appellant's counsel do not meet the simple fact issues directly. Their opening brief is concerned largely with collateral matters. But even these they argue obliquely and circuitously; and in so doing, they pile false assumption upon false assumption and specious inference upon specious inference to the point of complete fantasy.²⁵

Illustrative of the collateral nature of counsel's argument is their complaint appearing on page 4 of their opening brief that:

"The findings [of fact] do not bother to say a word, pro or con, regarding the results of Joseph's earnest and successful efforts to get together large amounts of financing in Chicago."

But the record is clear that *Joseph breathed not one word about his so-called efforts to O'Donnell*. Joseph so testified and so did O'Donnell (Joseph, R. 556; O'Donnell, R. 1646). Because the efforts of Joseph were uncommunicated to O'Donnell and were otherwise unknown to him, they could have no bearing on the initial question of whether Joseph and O'Donnell had

²⁵ Cf. *Harris v. Morse*, S.D. N.Y. 1931, 54 F.2d 109, 116:

"As Judge Thomas said in an admiralty case, the Baron Innerdale (D. C.), 93 F. 492, at page 493, in dealing with the question whether a plaintiff had sustained the burden of proof: 'Courts are required to examine, compare, analyze, infer, weigh, and strike the balance of probabilities; but they are not required to hazard opinions that a person has done wrong, without the presentation of intelligible and substantiated facts which tend to establish the accusation. *A question of fact may be refined to such a degree that an accurate solution is beyond any reliable intellectual process. At such point of mystification, the court is justified in holding that the libellant has not sustained the burden of proof; that the domain of reasoning has been passed, and that of pure surmise entered.*'

"That is a domain into which even a court of equity, in spite of its sensitized conscience and its plastic practice, cannot properly pass." (Emphasis supplied.)

or had not made and assented to reciprocal promises each to the other. Since the trial court confined the limits of its determination to whether a contract of joint venture existed between Joseph and O'Donnell, those actions of Joseph, being completely unknown to O'Donnell, are entirely beside the point even *if* they actually occurred. Hence, no finding with regard to them was required, and if made, such finding would amount to nothing more nor less than unimportant surplusage. In such case, no finding by the District Court was required. *Kustoff v. Chaplin*, 9 Cir. 1941, 120 F.2d 551.²⁶

To summarize, the basic issues before the trial court were simple fact issues. They required a fact determination of whether Joseph and O'Donnell intended to and did make and assent to reciprocal promises, what the promises were, if made, and how the making of them was outwardly manifested by each to the other. After reviewing the entire record, the trial court was unable to "find assent and agreement on minimum elements amounting to a legally enforceable contract" (R. 4258-9). The court said (R. 4254):

"... I am completely satisfied that there were no express words of agreement passing between Joseph and O'Donnell which would amount in law to a contract. I cannot find that any such words were spoken by Joseph or, if so, that they were understood and assented to by O'Donnell."

The court further said (R. 4257):

²⁶ In *Kustoff v. Chaplin*, *supra*, at pp. 560-1, this court said:

"... It is well established that when the findings of fact actually made control the judgment, failure to find on other issues becomes immaterial. There was no reversible error in such failure to make findings."

“Now, let us go to the next point. Was there any course of conduct between these men that gave rise to the implication that they had a legally binding contract for a joint purchase of Kinzua? I have looked the evidence over from stem to stern and I can’t find it. Of course, if you start with the *assumption* that they had an express agreement to that effect in the first place, then you can find support for the *assumption* in *isolated* parts of the conduct afterward; but if you don’t start with that assumption, you can’t find a contract in the course of conduct of the parties.” (Emphasis supplied)

II.

Burden of Proof on Joseph; Strong, Clear, Convincing Evidence Required

Under Oregon law the burden of proving the facts essential to the creation of a contract of joint venture rests upon the person asserting its existence. *Preston v. State Industrial Accident Commission*, 1944, 174 Or. 553, 149 P.2d 957, 961; *Bogle v. Paulson*, 1949, 185 Or. 211, 201 P.2d 733, 740; *Burnett v. Lemon*, 1948, 185 Or. 54, 199 P.2d 910, 915; *Powell v. Powell*, 1947, 181 Or. 675, 184 P.2d 373, 381. And the burden is much greater when the suit is between the alleged adventurers themselves and the person seeking to establish the relationship relies upon an oral agreement, or the acts of the parties, or both. *Burnett v. Lemon*, *supra*; cf., *Bogle v. Paulson*, *supra*.

That burden of proof is not sustained, under Oregon law, by the introduction of evidence in the record “which is consistent with the existence of a partnership, but equally consistent with its non-existence.” *Preston v. State Industrial Accident Commission*,

supra, p. 962.²⁷ Nor is it sustained on appeal, where the trial record was such that a "decision fortified by quotations from the record could be written either way"; for such an appeal "submits only questions of fact," and in that case the findings of the trial judge to the effect that no joint venture exists will be sustained, even though the testimony of the witness on which the finding was based was contradictory. *Bogle v. Paulson*, 1949, 185 Or. 211, 201 P.2d 733. In that case the Oregon court said at page 737:

" . . . The appeal submits only issues of fact. If the appellant's testimony is believed, he and the respondent were joint adventurers in the timber transactions he described. If the respondent's testimony is true, his relation to the appellant with regard to the timber mentioned in the complaint was that of employer. Each supported his contention with evidence. A decision fortified by quotations from the record could be written either way. . . . The outcome of the case is dependent upon whether one believes the appellant or the respondent. Anyone who accepts the appellant's version will possibly feel that the respondent took advantage of a tip given to him by the appellant that the Smith Company was in the market for Grant

²⁷ In *Preston v. State Industrial Accident Commission*, 1944, 174 Or. 553, 149 P.2d 957, 961, the Oregon court said at page 962: "The mere introduction in evidence of some conduct which is consistent with the existence of a partnership, but equally consistent with its non-existence, does not necessarily raise an inference of partnership when the burden of proof is upon the plaintiff. In its most favorable aspect, the plaintiff's evidence rises only to the level of bare speculation."

Facts which are consistent both with the existence and non-existence of a supposed premise do not establish the validity of the premise. This is illustrated by the following false syllogism: "All rose bushes have thorns. This bush has thorns. Therefore this bush is a rose." This, we think, is a basic error of appellant's approach in this case.

County timber and, through the use of the information, made a large profit. Those who accept the respondent's version will very likely believe that the appellant is endeavoring to reap where the respondent, and not the appellant, has sown. . . .

"In endeavoring to persuade us to disregard the trial judge's appraisal of the evidence, the carefully prepared brief of appellant's counsel emphasizes the fact that the respondent, as a witness, at times employed terms and expressions that were vague, equivocal and contradictory."

Despite this argument, the trial court found *as a fact* that no joint venture existed. In upholding the findings of the lower court, the Oregon Supreme Court said at page 739, *et seq.*, of 201 P.2d:

" . . . the respondent, upon being asked for a fact, gave his impression, and upon being asked for a conversation, did not repeat what he had heard but gave the substance. Not all truthful persons make good witnesses, and not all good witnesses are truthful. Many laymen of good character find it impossible to realize that a question that calls for the terms of a parol contract requires them to repeat what was said when the negotiations were under way, and not to give their conclusions. . . . Upon the witness stand, some persons are at their worst; to them it is a pillory.

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"All that we have before us as a result of the trial which was held in the Circuit Court are the words that the witnesses uttered. Many times the countenance of the witness and the tale it tells are a more reliable index to the truth than the witness's tongue. The tongue is subject to the witness's studied volition, but his manner, his gestures, his

passions and the tone of his voice may be unwitting. A meditated, carefully thought-out answer, even though it dovetails perfectly with the rest of the witness's testimony, may be less convincing than testimony given readily and without delay by another whose answers do not always accord.

“We do not believe that the fact that the respondent at times contradicted himself requires a holding that his testimony is unsatisfactory. He may not have heard correctly the questions that were addressed to him; the shouted voice may have confused him; or, like many others, he may have been unable to transfer readily from his mind to his tongue the facts he wished to utter. It is evident that the trial judge believed him and did not attribute his defects as a witness to an absence of good character. We think that we ought to defer to the trial judge's appraisal of this witness.”

Since in this case appellant seeks the “imposition of a trust” he can sustain his burden only by proof possessing *extraordinary* persuasiveness. For it is settled Oregon law that the Oregon courts will not impose a constructive trust “by parol unless the complainant sustains the burden of proof by strong, clear and convincing evidence.” *Hughes v. Helzer*, 1947, 182 Or. 205, 185 P.2d 537, 545. In that case the Oregon Supreme Court said at page 545 of 185 P.2d:

“ . . . this court has emphasized that in this particular sort of case the proof, in order to preponderate, must be of an *extraordinary persuasiveness*. Some of the cases, with the court's comments upon the character of the evidence required, follow: *Sisemore v. Pelton*, 17 Or. 546, 21 P. 667 (*clear, certain, and convincing*); *Snider v. John-*

son, 25 Or. 328, 35 P. 846 (*full, clear, and convincing*); Barger v. Barger, *supra* (*strong, clear, convincing, and indubitable*); Oregon Lumber Co. v. Jones, 36 Or. 80, 58 P. 769 (*clear, certain, and convincing*); Schwartz v. Gerhardt, 44 Or. 425, 75 P. 698 (*clear and convincing*); De Roboam v. Schmidlin, 50 Or. 388, 92 P. 1082 (*clear and convincing*); Chance v. Graham, *supra* (*clear, explicit, and satisfactory*); Barnes v. Spencer, 79 Or. 205, 153 P. 47 (*clear, full, and convincing*); Coe v. Coe, 75 Or. 145, 145 P. 674 (*clear and definite*); Neppach v. Norval, 116 Or. 593, 240 P. 883, 242 P. 605 (*clear and unequivocal*); Smith v. Barnes, 129 Or. 138, 276 P. 1086 (*clear and highly cogent*); American Surety Co. of New York v. Hattrem, 138 Or. 358, 3 P.2d 1109, 6 P.2d 1087; Johnston v. McKean, 177 Or. 556, 162 P.2d 820, and Fox v. Maurer, 178 Or. 64, 164 P.2d 417 (*strong, clear, and convincing*).” (Emphasis supplied)

This is in line with the law generally. In this connection Prof. Bogert says:

“As with the proof of express and resulting trusts, so in the case of the establishment of constructive trusts, the courts have announced that they require ‘clear and convincing’ evidence. Other judicial expressions are even stronger in their demands. *‘If the evidence is doubtful or capable of reasonable explanation upon a theory other than the existence of the trust, it is not sufficient to support a decree declaring and enforcing the trust.’* Sometimes the requirement is stated to be that the facts leading to the decree establishing the constructive trust must be proved ‘by greater weight than the mere preponderance of the evidence,’ or beyond a reasonable doubt.” (Emphasis supplied)

3 Bogert, Trusts and Trustees, 1946, Part 1, §472, pp. 13-14.

If the rule were otherwise, a constructive trust could be imposed against the will of a constructive trustee with a lesser quantum of proof than that required to establish a voluntary express trust, a principle which, we think, could hardly be argued.

The "clear and convincing" rule applies to cases where the joint venture relationship is claimed as the basis of the constructive trust. In such cases each of the factual elements of the contract of joint venture must be proved by the same degree of proof. *Kislak v. Kreedian*, 1957, 95 So.2d 510, 515; *Coryell v. Marrs*, 1937, 180 Okla. 394, 70 P.2d 478; *Greenbaum v. Kirkpatrick*, W.D. Okla. 1955, 129 F.Supp. 648, 650, note 2; 48 C.J.S. §12h(3)(b), p. 859.

Thus, in *Coryell v. Marrs*, *supra*, the Oklahoma Supreme Court said:

"Before this court can hold that the lease in question was bought . . . in violation of [a] joint adventure agreement existing at the time . . . and declare that an interest . . . is held in trust . . . the fact of the existence of a joint adventure at the time, and not one to take place at some future time under certain conditions, must be fully established as well as the fact that a lease on this particular land composed a part and parcel of the joint adventure agreement. The existence of a constructive or resulting trust must be proved by *clear, unequivocal* evidence. *Boles v. Akers*, 116 Okla. 266, 244 P. 182. *Until all these conditions are fully met with proper proof, this court would not be warranted in ordering an accounting as asked. . . .*" (Emphasis supplied.)

The same principle was stated by the Seventh Circuit in *Jacoby v. Shell Oil Co.*, 1952, 196 F.2d 855, a case in which the plaintiff complainant sought the imposition of a constructive trust based upon a breach of fiduciary obligations arising from the principal and agent relationship, the obligations in all respects being similar to those arising from a joint venture. In this case the Seventh Circuit said, at page 858:

“Proof to establish a constructive trust must be clearly convincing and so strong and unequivocal as to lead to but one conclusion. If the evidence is doubtful or capable of reasonable explanation upon a theory other than the existence of a trust, it is not sufficient to support a decree declaring and enforcing the trust [Citing cases]. The rule is similar where an attempt is made to establish by parol evidence a fiduciary relationship as the basis of a constructive trust.”

III.

This Court Should Not Substitute Its Findings for the Trial Court's

A. The Trial Court's Findings Are Supported by Substantial Competent Evidence

The essence of the trial court's findings was:

1. That Joseph and O'Donnell had not made and assented to reciprocal promises either expressly or by implication and hence no agreement of joint venture existed between them;

2. That if any relationship existed between them it was terminated, as a matter of fact, at or about the end of March, 1953, and at the very least, under the circum-

stances O'Donnell had a right to believe that it was terminated; and

3. That Joseph, as a matter of fact, speculatively delayed asserting any claim against appellees for more than 20 months after Kinzua was acquired by them, during which period the venture was fraught with peril, and he asserted his claim only after he was certain the venture would prove profitable; accordingly, the court concluded that appellant was estopped, by reason of laches, to assert any claim against appellees, if any he had.

Each of the trial court's findings of fact is supported by substantial and competent evidence. In Appendix II we have documented each and every one of them to the record itself.

B. Findings Concerning Parties' Intentions and Factual Inferences Are Findings of Fact

The initial basic issue in the court below was whether an agreement of joint venture existed between Joseph and O'Donnell. This, of course, involved a determination of their intentions, motives and designs. There were no writings between them which in any way referred to any agreement of any kind.

Hence, whether or not Joseph and O'Donnell intended to and did make reciprocal promises each to the other could be inferred only from their acts and words viewed in the circumstances in which they were expressed and performed.²⁸ This required not only a de-

²⁸Cf. Judge Learned Hand in *New York Trust Co. v. Island Oil & Transport Corp.*, 2 Cir. 1929, 34 F.2d 655, 656:

"It is quite true that contracts depend upon the meaning which the

termination of what words and acts were expressed and performed, but a reconstruction of past events, many of which could be so reconstructed only by inference.²⁹ The testimony was highly conflicting both in regard to Joseph's and O'Donnell's words and acts and in regard to the circumstances in which they were spoken and performed.

Thus, Joseph testified that an express agreement was assented to by him and O'Donnell during their Portland meeting on November 18, 1952. Chinn, who was present at the meeting, testified that no agreement was entered into at that time. O'Donnell emphatically testified that he and Joseph reached no agreement of *any kind at any time*, either on November 18 or subsequently.

Thus, the court was called upon to weigh the evidence and judge of the credibility of the witnesses. This it had ample opportunity to do; for Joseph testified for approximately four days and his testimony covers some 475 pages of the printed record; O'Donnell also

law imputes to the utterances, not upon what the parties actually intended; but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable. The standard is what a normally constituted person would have understood them to mean, when used in their actual setting."

²⁹In its oral memorandum decision, the trial court said (R. 4247):

"The reconstruction of past events, in the great majority of cases, at least, is not now an exact science nor is it ever likely to be, human nature continuing as it is. All that I can do in this position is to exercise such reason and judgment as I have, in the light of such experience as I have had, on such evidence as has been presented to me. Absolute certainty is an impossibility in this naughty world. The best we can do is to have a moral certainty, a reasonable certainty, which may vary according to the circumstances. In my own mind I have a certainty to that extent on the questions presented to me here which I consider primarily question of fact."

testified approximately four days and his testimony aggregates some 524 written pages. In judging of the credibility of the witnesses the trial court said (R. 4248-9):

“I want to say another general thing about the credibility of the witnesses. Part of the responsibility of a trier of the fact in weighing the credibility of witnesses is to look at them and to listen to them to try to evaluate the kind of people they are, and to gain some impression from the way they testify and from their appearance and demeanor as to what kind of people they are, how credible they are, and what weight and value should be given to their testimony. Sometimes it happens, gentlemen, that the very forensic defects and inadequacies of a witness will speak more forcefully of his credibility and the meaning of the words he uses than if he were more glib, more positive and certain about the matters concerning which he gives testimony. I have seen the thing happen with juries time and again. It happens, certainly, with me as an individual. It has happened in this particular case. The very inadequacies of Mr. O'Donnell, as a witness, somehow or other have brought to me a conviction as to his integrity and credibility that might be difficult to understand simply from a reading of the cold record of exactly what he said.

“I cannot subscribe to the castigation of Mr. O'Donnell's character and of his testimony that counsel for the plaintiff have given in their briefs and argument, although I am far from resentful of their [making it].³⁰ It is their duty to make that

³⁰Words within brackets supplied from stenographic transcript of District Court's proceedings.

contention [if they sincerely] believe the record supports it. I [haven't any doubt] of the professional integrity of plaintiff's counsel; I just [can't] agree with their view, and I don't [agree] with it. *I must say that Mr. O'Donnell impressed me most favorably.*" (Emphasis supplied)

In essence the trial court accepted O'Donnell's version of the facts and rejected Joseph's.³¹ The trial court found (R. 4258-9):

"... Under the evidence which to me seems credible, the relationship between these parties at best is so vague, indefinite, and speculative, that as the trier of fact I cannot find assent and agreement on minimum elements amounting to a legally enforceable contract."

Where, as here, the parties' intentions and factual inferences are found from conflicting testimony, the court's findings with respect to each are findings of fact pure and simple and appellant's long and involved argument cannot make them otherwise. *United States v. Yellow Cab Company*, 1949, 338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150; *United States v. Oregon State Medical Society*, 1952, 343 U.S. 326, 72 S.Ct. 690, 96 L.ed. 978; *Quon v. Niagara Fire Ins. Co. of New York*, 9 Cir. 1951, 190 F.2d 257; *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 9 Cir. 1949, 178 F.2d 541; *Grace*

³¹Cf. Jerome Frank, J., in *Broadcast Music, Inc. v. Havana Madrid Restaurant Corporation*, 2 Cir. 1949, 175 F.2d 77, 81, n. 12:

"Judges are usually reluctant to call a witness a liar. See Moore, Facts (1908) § 1048-1050. They prefer more polite locutions, such as saying his testimony was 'latitudinous'; see Mr. Justice Baldwin in *Poole v. Nixon*, 19 Fed. Cas. 992, at p. 996, No. 11,270.

"Moreover, as may well have been the case here, the judge may think the witness did not commit perjury but was honestly mistaken, because of bias or for other reasons."

Bros. Inc. v. Commissioner of Internal Revenue, 9 Cir. 1949, 173 F.2d 170; *Weyl-Zuckerman & Co. v. Comm'r. of Internal Revenue*, 9 Cir. 1956, 232 F.2d 214.

It follows that since the court's findings epitomized above are supported by competent, credible evidence they are binding upon this court, under Rule 52(a), Federal Rules of Civil Procedure reading as follows:

“... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses.”

A presumption of correctness attaches to the findings of the trial court, and where, as here, the findings are based on the trial court's evaluation of conflicting evidence, this court will not substitute its own evaluation thereof for that of the trial court. *United States v. Yellow Cab Company*, 1949, 338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150; *United States v. Oregon State Medical Society*, 1952, 343 U.S. 326, 72 S.Ct. 690, 96 L.ed. 978; *Quon v. Niagara Fire Ins. Co. of New York*, 9 Cir. 1951, 190 F.2d 257; *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 9 Cir. 1949, 178 F.2d 541; *Hunt Foods, Inc. v. Phillips*, 9 Cir. 1957, 248 F.2d 23, 31; *Ruud v. American Packing & Provision Co.*, 9 Cir. 1949, 177 F.2d 538; *Russell v. Texas Company*, 9 Cir. 1956, 238 F.2d 636; *Continental Casualty Co. v. Schaefer*, 9 Cir. 1949, 173 F.2d 5, 8; *Puget Sound Pulp & Timber Co. v. O'Reilly*, 9 Cir. 1956, 239 F.2d 607.

In *Fegles Const. Co. v. McLaughlin Const. Co.*, 9 Cir. 1953, 205 F.2d 637, 639, this court said:

“... when a finding is attacked as being unsupported, the power of the appellate court *begins and*

ends with a determination as to whether, considering the whole record, there is substantial evidence which supports the conclusion reached by the trier of fact.” (Emphasis supplied)

And, the circuit court should not disturb the findings of the district court even though it might have reached a contrary decision had it determined the facts in the first instance. In *Puget Sound Pulp & Timber Co. v. O'Reilly*, 9 Cir. 1956, 239 F.2d 607, 609, this court said:

“... regardless of *what decision* this court might reach, were it considering the evidence in the first instance, *it may not disturb the trial court's finding unless it is clearly erroneous.*” (Emphasis supplied)

C. This Court Should Not Reconsider the Case De Novo

Shorn of invective and subtleties, appellant's opening brief, it seems to us, is nothing more nor less than an argument that this court, contrary to its own decisions and the clear mandate of Rule 52(a), should *reconsider* this case *de novo*, *re-evaluate* the sharply conflicting evidence and *substitute* its judgment for that of the able and competent trial judge who decided the case. Specifically, appellant asks this court:

1. To *reject* the trial court's finding that no agreement, express or implied, existed between Joseph and O'Donnell;
2. To *substitute* a finding that an agreement did exist between them;
3. To *interpolate* in the agreement so found the terms and conditions thereof, including the specific obligations owed by each to the other;

4. To *find additionally* that the agreement so found contains all of the *factual* bases for a valid *contract* under Oregon law;

5. To *find additionally* that Joseph had honored and performed the duties owing to O'Donnell under the terms *interpolated* in such contract;

6. To *find additionally* that O'Donnell had breached specific obligations owing to Joseph under the terms *interpolated* in such agreement;

7. To *reject* the trial court's finding that if any relationship existed between Joseph and O'Donnell it was terminated;

8. To *substitute* its own finding that such relationship continued in effect;

9. To *reject* the trial court's finding that Joseph speculatively delayed bringing this action; and

10. To *substitute* its own finding that the action was timely brought.

Thus, appellant's counsel urges this court to *re-try* the case *de novo*, to completely *re-evaluate* the evidence and to *reject, substitute* and *add* findings "almost entirely concerned with imponderables" such as the intentions, designs and motives of Joseph and O'Donnell with respect to acts and occurrences which took place some three or more years before the trial in the court below, notwithstanding that the facts were found by the trial court after it had weighed the evidence and judged of the credibility of the witnesses.

This very same argument has been rejected both by the Supreme Court of the United States and by this

court. *United States v. Yellow Cab Co.*, U.S. 1949, 338 U.S. 338, 339, 340; *United States v. Oregon Medical Society*, U.S. 1952, 343 U.S. 326, 331; *Ruud v. American Packing & Provision Co.*, 9 Cir. 1949, 177 F.2d 538; *Russell v. Texas Company*, 9 Cir. 1956, 238 F.2d 636.

In *United States v. Yellow Cab Co.*, U.S. 1949, 338 U.S. 338, 340-341, the United States Supreme Court speaking through Mr. Justice Jackson said:

“What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of parties to certain 1929 business transactions. . . .

“These were the chief fact issues in a trial of three weeks’ duration. The Government relied in large part on inferences from its 485 exhibits, introduced by nine witnesses. The defendants relied heavily on oral testimony to contradict those inferences. The record is before us in 1,674 closely-printed pages.

“The Government suggests that the opinion of the trial court ‘seems to reflect uncritical acceptance of defendants’ evidence and of defendants’ views as to the facts to be given consideration in passing upon the legal issues before the court.’ We see that it did indeed accept defendants’ evidence and sustained defendants’ view of the facts. But we are unable to discover the slightest justification for the accusation that it did so ‘uncritically.’ Also, it rejected the inferences the Gov-

ernment drew from its documents, but we find no justification for the statement that it ‘ignored’ them. The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government’s evidence fell short of its allegations—a not uncommon form of litigation casualty, . . .

.

“Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants’ witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.” (Emphasis supplied)

In *United States v. Oregon State Medical Society*, 1952, 343 U.S. 326, 331-332, the Supreme Court of the United States, again speaking through Mr. Justice Jackson, said:

“The Government asks us to overrule each of these findings as contrary to the evidence, . . . We are asked in substance to try the case de novo on the record, make findings and determine the nature and form of relief. We have heretofore declined to give such scope to our review. *United States v. Yellow Cab Co.* (U.S.) *supra*. . . .

“... There is no case more appropriate for adherence to this rule [52(a)] than one in which the complaining party creates a vast record of cumulative

evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.” (Emphasis supplied)

This court also refuses to retry a case de novo. In *Ruud v. American Packing & Provision Co.*, 9 Cir. 1949, 177 F.2d 538, this court said at page 540:

“ . . . Manifestly, if the findings of the court are sustained by substantial competent evidence the judgment appealed from should be affirmed. These findings are presumptively correct and must be sustained unless clearly erroneous. [Citing authorities.] *Defendant’s argument is presented on the apparent theory that the action is triable de novo in this court but this is an appellate court and our function is to review alleged errors of law that may have been committed by the trial court. We are not at liberty to substitute our judgment for that of the trial court, and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and, if when so viewed, the findings are supported by substantial competent evidence, they should be sustained.*” (Emphasis supplied)

In *Russell v. Texas Company*, 9 Cir. 1956, 238 F.2d 636, this court said at page 644:

“ . . . No duty, in fact no authority, rests with us to review a trial court’s decision based on its view of the evidence unless a plain error of fact appears or there is a misapplication of a rule of law, [Citing cases.] Where the result is rational and reasonable, the acceptance or rejection of testimony by a trial judge is binding upon this Court, and what is thus done by the trial judge must not be disturbed by us, . . .” (Emphasis supplied)

IV.

**The So-Called "Admissions" and "Undenied Evidence,"
Being at Most Oral Testimony, Largely of Interested
Witnesses, Was Subject to Evaluation or Rejection by
the Trial Court**

We have heretofore pointed out that the court's findings are fact findings pure and simple. Appendix II, documented to the record itself, conclusively demonstrates that those findings are supported by substantial competent and credible evidence.

To induce this Court to ignore the trial court's findings and substitute its own, appellant's counsel fabricate a wholly false and specious argument. Under Heading II on page 19 of their opening brief, counsel state: "To the Extent That, as Here, the Challenged Findings Are Necessarily Based Upon Matters as to Which There Are Admissions by Defendants and Undisputed Matters and Documentary Evidence or Such Findings Are Conclusionary in Character, the Reviewing Court Does Not Give Great Weight to the Findings of the Trial Court." Heading (a) appearing on page 9 of their opening brief states: "Admissions and Undenied and Documentary Evidence Establish This Case." Since we discuss each of the so-called "admissions" and claimed "undenied evidence" in detail on pages 85 to 95 of this brief, and the documents which appellant seems to consider important on pages 95 to 119, we shall not comment again upon them in detail at this point.

But it is simply not true that a joint venture agreement is established between Joseph and O'Donnell by documentary evidence; for although several hundred

exhibits were introduced in evidence, none of them refer in any way to any agreement between Joseph and O'Donnell.³² Such documentary evidence as is competent at all is concerned solely with collateral facts, and bears only indirectly, if at all, upon the existence or non-existence of an agreement between Joseph and O'Donnell. Cf. *Quon v. Niagara Fire Ins. Co. of New York*, 9 Cir. 1951, 190 F.2d 257, 260.

Under the heading "Admissions and Undenied and Documentary Evidence Establish This Case," appellant's counsel falsely characterize some twelve or more items as "admissions" and two items as "undenied evidence."³³ On page 9 of appellant's opening brief, counsel say, "Plaintiff urges that the admissions of defendants alone virtually require judgment for plaintiff as an equal joint venturer in the purchase of a vast lumber company" Counsel then falsely assume that the so-called "admissions" and "undenied evidence" are *undisputed* facts. After making such false *assumption*, they erroneously conclude that the trial court's findings are "conclusionary in character" and that the findings and all testimony contradicting the so-called "admissions" and "undenied evidence" may be ignored by this court under the following language of the leading case of *Orvis v. Higgins*, 2 Cir. 1950, 180 F.2d 537, 539:

"(b) Where the evidence is partly oral and the balance is written or deals with undisputed facts,

³²An exception is Exhibit 117, a letter written to O'Donnell by Joseph's counsel, in the nature of a demand as a foundation to bringing this action, 20 months after *Kinzua* had been purchased by appellees.

³³Each of these is the subject of particular comment in the section of the brief commencing at page 84.

then we may ignore the trial judge's finding and substitute our own, (1) *if* the written evidence or some *undisputed fact* renders the credibility of the oral testimony extremely doubtful, or (2) *if* the trial judge's finding must rest *exclusively* on the written evidence or the undisputed facts, *so that his evaluation of credibility has no significance.*" (Emphasis supplied)

By such artifice does appellant's counsel seek to beguile this court to ignore the findings of fact the trial court found after *weighing* conflicting testimony and *judging* of the credibility of the witnesses.

Their argument is false from every standpoint.

The so-called "admissions" and "undenied evidence" *are not undisputed facts* controlling the disposition of the case *so that the trial judge's evaluation of credibility has no significance*, (the only basis upon which this court may ignore the findings of the trial court under the doctrine of *Orvis v. Higgins, supra*). Except for a very few agreed and insignificant items, themselves consistent with the *non-existence* of a joint venture agreement, *they are not facts at all*. Nor are they undisputed and undenied. Many of the so-called "admissions" and "undenied evidence" are at most misstatements and distortions of fragments of O'Donnell's and Joseph's *oral* testimony, snatched completely out of context, and upon which the trial court placed contrary evaluations. Others of them have no basis in fact at all.

Illustrative is counsel's assertion on page 10 of appellant's opening brief, that Joseph testified, without denial by Chinn and O'Donnell, that at the time of their

Portland visit on November 18, Joseph and O'Donnell agreed that Joseph and his group would take a 50% interest and O'Donnell and his group would take a 50% interest in Kinzua. That assertion is entirely false. As we show in detail elsewhere (pages 152 to 163 hereof), it is not even a statement of Joseph's own testimony; but Joseph's testimony, itself, was categorically and emphatically denied by both Chinn and O'Donnell (O'Donnell, R. 1647-50, 1652-5; Chinn, R. 905, 994, 1001-3).

Moreover, Joseph's testimony is entirely inconsistent with his own actions and statements during the Portland meetings on November 18 and 19, and subsequently. For example, when counsel's so-called "agreement" was supposed to have been created, Joseph did not know Kinzua's sale price and he knew little about Kinzua itself (Joseph, R. 374-5; *cf.*, Opinion, R. 4256; Finding V(1), R. 250). Immediately before going into the meeting with Kinzua's representatives on November 19, O'Donnell asked Joseph, "What is the dope, Harry?" and Joseph replied, "We will go upstairs and see Mr. Coleman *and find out*" (O'Donnell, R. 1625). When the sales price was announced by Kinzua's representatives, Joseph was genuinely surprised at the size of the sale price, and he stated that at most, he would be "a small minnow in this sea, this big sea" (O'Donnell, R. 1638, 1640-1, 1654). Following the meeting with Kinzua's representatives, he protested that the asking price for Kinzua was "outrageous" and unreasonable (O'Donnell, R. 1643; Chinn, R. 921). But after O'Donnell replied that if Kinzua had the timber and assets represented by Kinzua's sales representatives, the price

might not be unreasonable (O'Donnell, R. 1643; Chinn, R. 921; Joseph, R. 381), Joseph said that "maybe some of the boys who had some tax money could get together and put up \$600,000 and the deal could be sold to someone else" (O'Donnell, R. 1644-5; Chinn, R. 924-5). When O'Donnell replied he was a sawmill operator and was not interested in peddling sawmills, Joseph said "some of the boys around Chicago, friends of mine around Chicago, might be interested in a deal of this kind, and if they are, I will let you know" (O'Donnell, R. 1645). Joseph, however, did not then or at any time subsequently, give O'Donnell the names of any persons who might be interested in such a deal; nor did he indicate the amounts they might contribute individually or collectively (O'Donnell, R. 1646, 1948; Joseph, R. 555-6). And as a matter of fact, Joseph himself never told O'Donnell at any time that he would invest in Kinzua (O'Donnell, R. 1948; Joseph, R. 555-6).

Despite the foregoing, appellant's counsel claim that because Chinn and O'Donnell testified they could not remember insignificant details of their November 18th visit with Joseph prior to the meeting with Kinzua's representatives the next day, they were not in any position to deny Joseph's version of what occurred. Accordingly, they argue, Joseph's testimony stands undenied and was conclusive upon the trial court.

It is ludicrous to believe that any responsible business man would forget having agreed to supply one-half the purchase price for the acquisition of a multi-million dollar property if he had actually done so. It should be too obvious to require argument that exact placing with

respect to time and location of the significant parts of an 18 hour period of conversation, visit and sleep is not the test of whose version of the crucial elements of a conversation or conversations is the correct one in spite of all else. It is clearly insignificant whether in fact the significant portions of the conversation took place on the way up to the University Club, at the bar in the University Club, at dinner, at the night club, in the hotel lobby or elsewhere, or whether it was at midnight one day or at noon the next. Except to the extent that such time and place bears on the credibleness of the story itself, it is in fact wholly immaterial. Joseph says the crucial conversation took place before the meeting with selling agents at a time when neither Joseph nor O'Donnell knew what in fact was for sale or the price thereof.³⁴ O'Donnell says any significant conversation took place either during the meeting with selling agents or immediately thereafter at a time when they had at least found out the selling price, the terms and the barest outline of what was for sale. O'Donnell's time sequence is much more probable than that of Joseph—then at least the parties to the conversation had some idea of what they were talking about.

In this situation, the trial court was forced to and did weigh the evidence and judge of the credibility of Joseph, Chinn and O'Donnell (Trial Court's Memorandum Decision, R. 4254-57; Finding of Fact V(1), R. 250). And it is for this very reason that this Court

³⁴Joseph did not so state on all occasions. In his letter dated June 23, 1954, to Lee Olwell (Exhibit 97), Terman's Seattle attorney, Joseph places the dinner at the University Club, and his alleged conversation with O'Donnell after the meeting with the sellers' agents, Coleman and Casey.

will not substitute findings of its own. As pointed out by Judge Jerome Frank in *Orvis v. Higgins*, 2 Cir. 1950, 180 F.2d 537, 539-40, one of the principal cases upon which appellant's counsel rely:

“But where the evidence supporting his [the trial judge's] finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances.”

That is precisely the situation here.

In any event, as a matter of law, it simply is not true that the trier of the fact is bound to find in accordance with the statement of an interested party even if uncontradicted. This is the precise holding of this court in *Quon v. Niagara Fire Ins. Co. of New York*, 9 Cir. 1951, 190 F.2d 257, and of the Second Circuit in *Broadcast Music, Inc., v. Havana Madrid Restaurant Corporation*, 2 Cir. 1949, 175 F.2d 77, 79. In the *Quon* case, this court said (at p. 259):

“The argument of appellant is that the testimony of Quon, as to the details relied upon for estoppel, was uncontradicted. Therefore it is said this evidence must be accepted as conclusive. But the trial judge was entitled to consider other circumstances such as the facts at the time the case eventually came on for trial. After the time limited had expired, two witnesses were dead, and one very important witness had disappeared. The plaintiff was, of course, a highly interested party.

“In any event, *it is not true that the trier of the fact is bound to find in accordance with the statement of one witness or any number of witnesses which do not satisfy his mind.* This is a stock instruction to juries. The burden of proof was on appellant. *If the testimony produced lacked credibil-*

ity, it was not proof even if uncontradicted. The problem of proof cannot be resolved scientifically by quantitative analysis, as some have suggested. *The trial judge was the arbiter.* While the testimony of Quon and his witness, if believed, might have been sufficient to establish estoppel, a point which we do not decide, the findings clearly show they were not believed.” (Emphasis supplied)

In this case, it is obvious the trial court did not believe Joseph.

In *Broadcast Music, Inc., v. Havana Madrid Restaurant Corporation*, 2 Cir. 1949, 175 F.2d 77, 79-81, Judge Jerome Frank said:

“Plaintiffs contend that, as the testimony of the witness Castro was uncontradicted, unimpeached by anything appearing in the record, and not inherently improbable, the trial judge was obliged to accept it as true, and that therefore the judge’s findings are ‘clearly erroneous.’ We cannot agree.

“Whether the so-called ‘uncontradicted testimony’ rule has been adopted by the Supreme Court we are not at all sure. . . . The rule, absent . . . qualifications, has been rejected in several states, and has little to commend it rationally. For the demeanor of an orally-testifying witness is ‘always assumed to be in evidence.’ It is ‘wordless language.’ The liar’s story may seem uncontradicted to one who merely reads it, yet it may be ‘contradicted’ in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which ‘cold print does not preserve’ and which constitute ‘lost evidence’ so far as an upper court is concerned. . . . A ‘stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a

sentence mean the reverse of what the words signify. . . . The witness' demeanor, not apparent in the record, may alone have 'impeached' him. . . .

.

"We shall, however, assume, *arguendo*, that the rule prevails in the federal courts. Even so, it will not avail plaintiffs. For among the exceptions to the rule is this: *It is inapposite if the witness has an 'interest.'* . . . As Castro's testimony had no corroboration, this case comes within the 'interest' exception to the rule. We may not, then, disregard the trial judge's finding of fact based obviously on his disbelief of the testimony on which plaintiffs rely." (Emphasis supplied)

Counsel's so-called "admissions" and "undenied evidence" are entitled to no special sanction because they are so characterized. Certainly the unsupported statements of counsel are entitled to no consideration at all. Nor was the trial court bound by counsel's interpretation and construction of the so-called "admissions" and "undenied evidence." It was the trial court's bounden duty to place *its own* evaluation upon such evidence *after* viewing it in its proper "setting together with all the other evidence in light of the credibility accorded the witness[es]." *Quon v. Niagara Fire Ins. Co. of New York*, 9 Cir. 1951, 190 F.2d 257, 260. And this is true with respect to so-called documentary evidence as well as oral testimony. Thus in the *Quon* case, this Court said (at p. 260):

"It is urged with great force that the solution of this cause depends upon a letter written by Quigg to Quon's attorney soon after the first investigation, and that this Court must interpret this

writing irrespective of the finding of the Trial Court. . . .

“ . . . here the question was one of waiver or of estoppel, which involves among other factors the intention of the party. The writing under these circumstances must be viewed in its setting together with all the other evidence in light of the credibility accorded the witness. Here the writing is one of the collateral facts. . . . Here the Trial Court held that there was neither waiver nor estoppel, that there were no misrepresentations, and that Quon was not misled.

“Under such circumstances, the use of the cliché that the appellate court is in as good a position as the trial judge to construe a writing is futile. The maxim is not true, as often happens with stereotyped sayings, in this situation. *Here the construction entered into a finding of fact which cannot be set aside unless clearly erroneous. . . .*

“The theory that there is some magic in the writing itself and that the construction of writings by an appellate court has some special sanction is applied not only in cases such as this, but to depositions, incidental documents, stipulations before the trial court and other features. None of this is valid. *The problem before the court is generally one of fact, and there the findings of the trial court are binding.* There are many cases where the construction of writings is a question of law. *But here the interpretation of this document was required in connection with many circumstances as a question of fact.* There was substantial evidence to support the findings, and these are not clearly erroneous. No rule of law was violated.” (Emphasis supplied)

Here the problem before the trial court was whether

or not *as a matter of fact* Joseph and O'Donnell intended to and did enter into a joint venture agreement, express or implied in fact. The issues involved were fact issues pure and simple. Viewing the entire evidence, as the trial judge said, from stem to stern, he found the facts adversely to appellant's claim. As in *Quon* appellant may not now fabricate a legal issue out of these purely factual matters. The trial court's findings are not only supported by substantial competent evidence; they are correct. No rule of law was violated. The trial court's findings should not be disturbed.

V.

The Keystone to Appellant's Case Missing—No Agreement of Joint Venture by Express Words or Implication Arising by Conduct

As the trial court in its oral opinion so aptly stated:

“The burden rests upon the plaintiff in the first instance to establish the existence of the joint purchase agreement as an element of a contract of joint venture. . . . Such a contract could only be established by either *express words* to that effect or by *implication arising* from the conduct of the parties or by a combination of both. There is no other possible way that it could arise, that basic contractual relationship between them.” (R. 4253-4; Emphasis supplied)

Joseph's claim is based upon his counsel's assumption that an *express oral contract of joint venture was entered into between him and O'Donnell on November 18, 1952, at Portland, Oregon*. On page 12 of appellant's opening brief counsel say:

“They [Joseph and O'Donnell] agreed specifi-

cally and affirmatively that Joseph and O'Donnell, for themselves and groups headed by each of them in Chicago and Seattle respectively, should, as equal joint venturers negotiate for and consummate the purchase of Kinzua on whatever suitable purchase basis could be arranged."

This is the very keystone of appellant's case for even his counsel do not argue that the acts of the parties independently of the existence of the claimed express contract established a contract of joint venture. They go no further than to argue that the subsequent acts of Joseph and O'Donnell are consistent with its existence.

A. No Express Words of Contract

The claim of Joseph's counsel that a contract of joint venture was created by express agreement is without support in fact. The trial court's finding as stated in his opinion that

"I cannot find that any such words [express words of contract] were spoken by Joseph or, if so, that they were understood and assented to by O'Donnell." (R. 4254),

is fully supported by the record and the evidence.

The events leading up to the November 18 and 19, 1952 Portland visit of Joseph, O'Donnell and Chinn is covered in the trial court's Finding of Fact No. IV; and the Portland visit itself, including the meeting of November 19th with sellers' agents Coleman and Casey, is covered in Finding No. V.

Summarized, the following are the significant events which occurred during the entire Portland visit of November 18th and 19th, based upon the testimony of O'Donnell (whom the Trial Court said "impressed me

most favorably," R. 4249), and backed up by the testimony of Chinn (whom the trial court observed was very frank, R. 811):

1. Prior to their talk with the sellers' agents, O'Donnell and Joseph knew little about Kinzua other than that it was for sale (Chinn, R. 907-10; Joseph, R. 374-5; Terman, R. 1152-4, 1222-4; Needleman, R. 2764).
2. *The only significant reference to a possible purchase of Kinzua prior to the meeting with the sellers' agents Coleman and Casey the morning of November 19th was Joseph's comment to the effect of "Let's talk to Coleman and find out what this is all about" (O'Donnell, R. 1625).*
3. During the meeting with the sellers' agents, Coleman and Casey advised that the purchase price asked was twelve million dollars, payable \$4,800,000 down and the balance in annual installments of \$900,000 with interest at $4\frac{1}{2}\%$ (O'Donnell, R. 1632, 1634; Chinn, R. 914); *that they would not negotiate with prospective purchasers until satisfied such prospective purchasers were acting as principals, were persons of integrity and responsibility, and had sufficient operating capabilities and financial resources to purchase and operate the Kinzua properties (O'Donnell, R. 1634); and, further, that they would not permit an inspection or investigation of Kinzua properties and financial affairs without the prior deposit by the prospective purchasers of \$600,000 in cash, the \$600,000 to be returned if the holdings and financial statement were not as represented; otherwise, the \$600,000 to apply on the purchase price or be forfeited if the purchase was not completed (O'Donnell, R. 1632; Chinn, R. 915).* The assets concerned were out-

lined in a very general way, including the statement that there was at least 500,000,000 feet of timber involved (O'Donnell, R. 1632-3; Chinn, R. 914-5).

4. *The only reference made by Joseph, O'Donnell or Chinn that could be construed as indicating his (Joseph's) interest in a participation in a possible purchase of Kinzua was the statement made by Joseph during the meeting with Coleman and Casey when, upon hearing of the twelve million-dollar asking price, he indicated surprise at the amount and said, "Well, I would be a small minnow in such a big sea," or words to that effect (O'Donnell, R. 1654, 1638, 1640).*
5. *In the few minutes that O'Donnell and Chinn were with Joseph immediately following the meeting with sellers' agents, Joseph protested the price asked was unreasonable (O'Donnell, R. 1643-4; Chinn, R. 921), and O'Donnell stated if they had the assets they outlined the price might be all right (O'Donnell, R. 1643-4; Chinn, R. 921). Joseph then suggested that maybe some of the boys who had some tax money could get together and put up the \$600,000 (required for inspection) and the deal could be sold to someone else (O'Donnell, R. 1644-5; Chinn, R. 924-5). O'Donnell said he was a sawmill operator and was "not interested in peddling sawmills" (O'Donnell, R. 1644-5; Chinn, R. 924-5). Whereupon, Joseph said:*

"Well, some of the boys around Chicago, friends of mine around Chicago, might be interested in a deal of this kind, and if they are, I will let you know."

He did not state or indicate who they might be, nor the amounts they might invest (O'Donnell, R. 1645-6; Joseph, R. 556).

6. O'Donnell inquired of Joseph what Terman's interest in Kinzua might be and Joseph replied, "Oh, don't worry about him. He is a friend of a lawyer down there who is the attorney for one of the big stockholders, a widow, or a woman in California" (O'Donnell, R. 1646-7; Chinn, R. 921-4).
7. When O'Donnell and Joseph parted in Portland, there was no understanding about what would be done in the future other than that Joseph indicated he would let O'Donnell know if any of his Chicago acquaintances became interested (O'Donnell, R. 1643-55; Chinn, R. 927-8).

The foregoing fully supports the trial court's findings that:

- (1) "I am completely satisfied that there were no express words of agreement passing between Joseph and O'Donnell which would amount in law to a contract. I cannot find that any such words were spoken by Joseph or, if so, that they were understood and assented to by O'Donnell." (R. 4254)
- (2) "This is just one of the many circumstances in the evidence that has led me to the firm conclusion that there were no express words of mutual understanding and assent sufficient to amount to contract between Joseph and O'Donnell." (R. 4255-6)

B. No Contract by Implication Arising from Conduct or Combination of Words and Conduct

As noted in the preceding section, the keystone to appellant's case is the *assumption* of an express agreement reached at the Portland meeting between Joseph and O'Donnell. There was, in fact, no such agreement; therefore, appellant's case should fall at that early point.

However, the trial court went further in his oral opinion and Findings of Fact. He posed the question, "Was there any course of conduct between these men that gave rise to the implication that they had a legally binding contract for a joint purchase of Kinzua?" (R. 4257), and found that there was none, stating:

"... I have looked the evidence over from stem to stern and *I can't find it*. Of course, if you start with the assumption that they had an express agreement to that effect in the first place, then you can find support for the assumption in isolated parts of the conduct afterward; but if you don't start with the assumption, you can't find a contract in the course of the conduct of the parties." (R. 4257)

"... *The evidence is wholly insufficient to establish a contract arising by implication from the conduct of the parties.*" (R. 4258)

"... Under the evidence which to me seems credible, the relationship between these parties at best is so vague, indefinite, and speculative, that as *the trier of fact I cannot* find assent and agreement on minimum elements amounting to a legally enforceable contract." (R. 4258-9; Emphasis supplied)

Of course, a reading of most, if not all, of the testimony would be required to encompass the evidence considered by the trial judge. Even then, it would not be with the inevitable advantage of observing and hearing the witnesses. Keeping in mind that this brief would be extended beyond manageable limits if we discussed even generally all of the matters which were observed and considered by the trial court in concluding that Joseph's claim of joint venture is "*incredible and untenable*" (R. 4261), we now discuss and point up some

of the aspects of the evidence which, along with others, made the trial court's Findings and Conclusions inevitable.

1. The relationship of Joseph and Terman

a. *Terman had a direct interest in Joseph's suit*

Since Terman is often mentioned in this brief and he is the subject of much of the testimony and a large part of all of the exhibits are his handwritten memos, Terman's relationship to Joseph and to the Kinzua purchase is brought into focus at this point. Terman was far from being a disinterested witness. He had a very direct interest in Joseph's lawsuit.

Terman was a real estate agent in Beverly Hills, California, and was totally unfamiliar with logging and lumber manufacturing. He had once resided in Chicago where he had been a long-time social acquaintance of Joseph and knew that he operated a retail lumber yard in Chicago (Terman, R. 1146-7).

Needleman and Gold were law partners in Beverly Hills, California, and attorneys for Gladys Anderson Zurlo, a 49% stockholder of Kinzua (Admitted Fact IX, R. 156; Needleman, R. 2693, 2696-8; Gold, R. 2935). They were also both directors and members of the executive committee of Kinzua (Admitted Fact IX, R. 156; Needleman, R. 2693, 2696-8; Gold, R. 2935; Exhibit 653). Neither, however, was an authorized selling agent (Needleman, R. 2703, 2706).

Needleman, sometime in the early spring of 1952 or at least prior to October of 1952, advised his intimate social acquaintance Terman (a former tenant of the law

firm's offices) (Terman, R. 1281), that Kinzua was for sale but gave him no details (Terman, R. 1148, 1222-3; Needleman, R. 2713-4, 2764).

Needleman further advised Terman that Coleman (who was a selling agent) only wanted Needleman to refer prospects and not to discuss the details and that Coleman would deal only with principals and Terman would have to act as or for a principal (Terman, R. 1153; Needleman, R. 2727-9; Exhibits 502, 541). Terman could think of only one person in the lumber business who could front as a principal—Joseph (Terman, R. 1153-4). Needleman then wrote to Coleman about Terman (Exhibit 541) and drafted a letter for Terman to send to Coleman in which Terman advised Coleman he had no interest “except with Mr. Joseph and his associates.” (Exhibits 502, 540). Terman asked Coleman to advise him where they could discuss the matter (Exhibit 502), but Coleman never responded (Terman, R. 1169).

Terman's notes during this period contain the following statements:

“... Jim Needleman, atty. [attorney] for some of stockholders—who is guiding me . . . Has to be on direct basis which I am acting as for the moment—Fee not paid by seller. So arrange purchase price to allow 250 M for fee and costs” (Exhibits 328, 330);

“I advised Joseph that I am acting as his associate in this deal as Coleman prefers not to deal with brokers—Also told Joseph to allow 5% fee for me in event deal is made which he agreed to.” (Exhibit 335)

Terman in his voluminous memo exhibits also makes reference to his commission at least ^{TWELVE} eight other times.

While Chinn and O'Donnell were in Los Angeles on November 6, 1952, on their separate, unrelated businesses, Terman visited them at their hotel. Kinzua was discussed but Terman did not convey to them any information which was not already known by them (O'Donnell, R. 1605-8; Chinn, R. 872-3). This was the only occasion upon which O'Donnell ever met or talked to Terman. Terman, realizing that in O'Donnell as a principal there might be an entré to Coleman, informed Gold of the visit of Chinn and O'Donnell (Exhibit 340). Gold thereafter called Coleman who then called Joseph (Exhibit 342) and arranged with Joseph for the Portland meeting with Joseph and O'Donnell on Joseph's way to his annual winter vacation in California (Exhibits 344, 345). Joseph reported this to Terman who reported it to Gold (Exhibits 344, 345).

As O'Donnell was about to leave Portland on November 19, 1952, he inquired about Terman, and Joseph replied:

"Oh, don't worry about him. He is a friend of a lawyer down there who is the attorney for one of the big stockholders, a widow, or a woman in California . . . A friend of mine, a friend of one of the lawyers who represents one of the big interests."

(O'Donnell, R. 1646-7; Chinn, R. 921-2)

Thereafter, Terman's notes reflect, and Needleman's and Gold's notes confirm, what Terman states in his letter to Joseph of August 30, 1953, ". . . Everytime you [Joseph] and I [Terman] had telephone or letter communication, I would immediately advise Needleman

or Gold of the facts . . . ” (Exhibit 89). A conduit existed where Joseph relayed all information he got from O'Donnell to Terman, and Terman relayed it to Needleman or Gold, the attorney for the largest stockholder of Kinzua! That Joseph did not advise O'Donnell of this, however, is apparent from Exhibit 43, the transcript of a December 23, 1952, phone conversation between Gold and Casey, one of the selling agents. Certainly O'Donnell, out of good taste alone, would not have told Coleman at the time he advised him on December 19th that he was not going to proceed with Kinzua, that the timber looked buggy, short-bodied and black-knotted — but the information got there through the conduit.

Every step Joseph took appears from Terman's notes to have been at the push of Terman. However, after Joseph on December 30, 1952, advised A. C. Allyn (the head of a large investment firm in Chicago) (Joseph, R. 447-9; Allyn, R. 2871) that Kinzua was available for purchase (at which time Allyn thought Joseph was seeking a finder's fee) (Allyn, R. 2879), and from January 10, 1953, the date of Terman's memo (Exhibit 396) making reference to Allyn and that O'Donnell might still be interested, Terman (if his and Joseph's testimony and notes are to be believed) did not “push” or “jog” Joseph again nor inquire of Needleman or Gold about Kinzua in any way until after Kinzua's purchase (Joseph, R. 650-1).

Likewise, Joseph, freed from prodding by Terman, thereafter seemed to forget the matter, except for unsuccessful attempts to talk with Allyn during Febru-

ary and early March, so that he could report to Terman that he hadn't forgotten him (Exhibits 55 and 116). Even this interest disappeared completely insofar as the record and testimony indicates, in spite of the fact that Joseph was advised by O'Donnell in late February that Joe Coleman's brother had called him in Palm Springs, and that O'Donnell was going to meet with Joe Coleman (Exhibit 116). Nor did O'Donnell's telephone call on March 31, 1953, telling Joseph of Price's favorable report and that he (O'Donnell) was going to go ahead and look the Kinzua deal over (O'Donnell, R. 1840-1, 1947-8), or Allyn's telephone call to Joseph at the end of April, 1953, advising that Allyn was dropping Kinzua (Allyn, R. 2875-6), revive any interest or inquiry from Joseph or Terman (Joseph, R. 644, 634-6, 495-7; Terman, R. 1386).

Not until the end of August did either Terman or Joseph indicate any interest in Kinzua. On August 27, 1953, Joseph, learning of Kinzua's purchase by the appellees, wrote to Terman and suggested that Terman's friend Needleman, the conduit to the sellers, "should have said something to you about this" (Exhibit 87). Terman replied that he had asked Needleman for an explanation (Exhibit 89).³⁵

After reading O'Donnell's letter of September 22, 1953, to Joseph about the sale (Exhibit 93), Terman

³⁵ In an early memo of Terman's dated December 16, 1952, Terman reported that Needleman "said he would see that I was protected on commission as no deal would be made unless he knew about it and would see to it that I was protected on the commission" (Exhibit 379). Needleman denies this statement (Needleman, R. 2790). Needleman and Gold both knew in early July that a sale was very imminent to O'Donnell and others (Needleman, R. 2802, 2812, 2820-3; Gold, R. 2990-1).

stated in his letter to Joseph dated September 28, 1953 (Exhibit 96):

“... but what can be done in the sense of having something tangible to hang our hats on to substantiate our claim for compensation. I don't know, but you know this guy a lot better than I do and perhaps you know the answer.

“I believe you should pursue the matter further with O'Donnell without too much delay ...”

—which Joseph did 20 months later when his attorneys wrote to O'Donnell and the other defendants advising them, for the first time, of Joseph's and Terman's claims (Exhibit 117).

Although Joseph claimed that immediately after receiving O'Donnell's September 22, 1953, letter (Exhibit 96), he turned his file over to Sol Hoffman and did not see it again until the time of his deposition (Joseph, R. 642, 2291-2; Hoffman, R. 1141-4). Hoffman testified that the file was turned over to him as attorney for Terman, not Joseph (Hoffman, R. 1141-4). Terman's Exhibit 551 contains handwritten notes setting forth the names of a number of lawyers and law firms in Seattle, and Exhibit 553, a letter dated June 23, 1954, from Joseph to Lee Olwell (a Seattle attorney and one of the attorneys listed in Exhibit 551), indicates that Lee Olwell, as Terman's attorney, considered the matter of his claim for a commission or finder's fee. A year later this action was commenced by Joseph through one of the Seattle law firms named on Terman's list of possible lawyers (Exhibit 551).

Terman, to help Joseph prepare for his deposition, went from Beverly Hills to Chicago just a few days

before Joseph's deposition was taken by defendants, which was some time after the taking of the depositions of defendants by plaintiff. He took his voluminous file with him (Terman, R. 3892-3; Joseph, R. 2290). Joseph, during his deposition, admitted that his memory was very poor about Kinzua, and he continually tried to refresh it from Terman's memos and file, which Terman left with Joseph and his lawyers (Joseph, R. 2290-1).

Terman, upon his return to Beverly Hills and shortly before the taking of his deposition, supplemented his file with many new exhibits which are commented upon at pages 69-73 hereof. Terman was in attendance during both sessions of the Seattle trial.

Shortly before the trial of this case commenced, Joseph, through his attorney, Stanford Clinton, commenced an action in the State of New York in which he sues on behalf of himself and Terman, setting forth that Terman is entitled to the imposition of a constructive trust for 5% as well as substantially duplicating Joseph's 50% claim in this action (Exhibit 70).

Just shortly before the trial of this case, Terman commenced an action in Los Angeles, claiming a right to a constructive trust in 5% of the Kinzua properties, and a right to a commission in the alternative, setting forth that Joseph, one of the defendants named therein, is in accord with his claim (Exhibit 702). During the trial of this case, Terman identified Stanford Clinton, Joseph's chief attorney herein, as his attorney also (Terman, R. 1397).

It is clear that, if not a joint venturer with Joseph

in this suit,³⁶ Terman has a very direct interest in its result. If Joseph could establish his claim, Terman, as well as Joseph, would be a joint venturer with O'Donnell and the other defendants—Terman for his 5% and Joseph for his 50%. In fact, Terman in his California suit so claims (to be a joint venturer) and sets forth that Joseph agrees with this (Exhibit 702). If this suit is really an attempt to coerce payment of a commission or finder's fee (as well it may be), Terman, through his claim of being a joint venturer with Joseph, may hope to get around an otherwise insurmountable statute of fraud problem, a statutory requirement that

³⁶ In which event, Terman would be an indispensable party, as he also appears to be in the New York suit which Joseph brings to impress a trust upon certain interests in the Kinzua properties in his and Terman's behalf (Exhibit 701). Although Joseph testified that he was bringing this suit only on his own behalf, personally (Joseph, R. 589), if the story of his committed Chicago group (which appellees deny), were believed, Joseph would also be a joint venturer with such "investors" as well as being a joint venturer with Terman. In such event, these allegedly "committed investors" and Terman would be indispensable parties plaintiff and since they were not joined as parties plaintiff, the cause of action would be fatally defective for that reason alone.

See: Fed. Rules of Civ. Proc., Rule 19(a), 28 U.S.C.A.: *Grant County Deposit Bank v. MacCampbell*, 6 Cir. 1952, 194 F.2d 469, 31 A.L.R.2d 909; *Charne v. Essex Chair Co.*, D. N.J. 1950, 92 F.Supp. 164; *Chidester v. City of Newark*, 3 Cir. 1947, 162 F.2d 598; *American Insurance Co. v. Bradley Mining Co.*, N.D. Cal. 1944, 57 F.Supp. 545; *Calcote v. Texas Pacific Coal & Oil Company*, 5 Cir. 1946, 157 F.2d 216, 167 A.L.R. 413.

The defense of failure to join indispensable parties is not waived by failure to raise it prior to the trial; it may be raised at any time. Fed. Rules of Civ. Proc., Rule 12(h), 28 U.S.C.A.

Failure to join indispensable parties plaintiff is a defect which cannot be remedied by amended or supplemental pleading, or by assignment after suit has been commenced. See: *Bowles v. Senderowitz*, E.D. Pa. 1946, 65 F.Supp. 543; affirmed *sub nom Porter v. Senderowitz*, 3 Cir. 1946, 158 F.2d 435; *Eveland v. Detroit Machine Tool Co.*, E.D. Mich. 1927, 18 F.2d 963; *Chapman v. Griffith Consumers Co.*, D.C. Cir. 1939, 107 F.2d 263.

commission agreements be in writing, a statutory licensing requirement, that one be properly licensed, and a two-year statute of limitations.

b. Comment on the credibility of Terman's memos and testimony

Some ten days before the commencement of Terman's deposition and some few weeks after his return from Chicago, where he had gone with his amazing file to assist appellant in preparing for his deposition (Terman, R. 3892-3; Joseph, R. 2290-1), Terman again reviewed his file with its many diary or memo book entries and the many memo sheets which often duplicated but sometimes supplemented his diary entries (Terman, R. 1239-41, 1305-7). He then added considerable material to his file in the form of many additional handwritten memos, each bearing at the end thereof the date "11-7-55," such as Exhibits 301, 307, 319, 331, 366 and 309 (Terman, R. 1319-20).

In almost all cases these 11-7-55 exhibits were only excerpts from or summarizations of diary entries, but occasionally the new sheet enlarged upon the earlier material, such as in Exhibit 309, dated March 27, 1952, at the top and November 7, 1955, at the bottom. For here, his memo book entry (Exhibit 307) is considerably enlarged upon. Among other things, he mentions the purchase price as "perhaps around ten or twelve million dollars," and Coleman's name as president in Exhibit 309; Exhibit 307 says nothing about either. In view of the fact that there was evidence enough to the effect that neither Terman nor Joseph then knew the twelve million dollar asking price (Needleman, R.

2719; Joseph, R. 375; Chinn, R. 909-10, 919-21) to result in the trial court's finding that they did not (Oral Opinion, R. 4256), this addition is not entirely insignificant. A second notorious example is Exhibit 301, dated March 22, 1952, at the top and November 7, 1955, at the bottom, wherein Terman enlarged upon his prior memo book entry (Exhibit 303) by adding "approximate price of deal of about twelve million," Harry Joseph's name, and his connection with a "mammoth timber deal in New England years back."

With respect to other similar exhibits not bearing the date November 7, 1955, at the bottom thereof, Terman testified on trial and on deposition that they were all contemporaneous memos and, at the time of his deposition, November 17, 1955, admitted that he had on November 7, 1955, when reviewing his file, prepared the exhibits bearing date November 7, 1955 (Terman, R. 1319-20, 1343, 1349-50). However, some very few months later at the time of the resumption of his deposition on March 6, 1956, he testified not once but several times, and even after being thoroughly apprised of the fact by defendant's counsel and put on guard by his own attorney, that Exhibit 301 (being one of the recently prepared yellow sheets) was the contemporaneous memo of the event covered, and this in spite of the date 11-7-55 appearing on the bottom thereof, which date he then explained as the date he had attached Exhibit 301 to Exhibit 303 (Terman, R. 3900-8).

At the time of trial, with respect to the same Exhibit 301, he first testified several times the same way, to the effect that this was a contemporaneous memo prepared

on or about March 22, 1952 (Terman, R. 1302-4). But after a very convenient recess, he finally got on the right track (Terman, R. 1319-20). It would seem that this performance justifiably raises a question as to just when the various other very similar-appearing memos, such as Exhibits 302, 304, 327, 328, 330, 335, 340, 356, 358, 359, 360, 361, 374, 376, 379, 423, 394, 395 and 396 were prepared—a day or two after the events were cited or at some much later time when Terman reviewed his file for suit-bringing purposes? If he could get confused about a memo prepared just a few months before, bearing a date November 7, 1955, at the bottom, just what reliance can be placed upon any of Terman's many memos as representing a contemporaneous memo made of an event which just happened?

O'Donnell and Chinn both testified that Joseph was surprised at the twelve million dollar purchase price (O'Donnell, R. 1638, 1643; Chinn, 919-21). Joseph said he knew it beforehand (Joseph, R. 325). Exhibits 309 and 301, both dated 11-7-55, both indicate knowledge of this price as early as March 22, 1952. Could Terman's purpose in creating these two exhibits, one of which he claimed was a contemporaneous March 22, 1952, memorandum, have been to prove the point?

Exhibits 329 and 350, dated September 23, 1952, and November 13, 1952, respectively, are diary sheets from Terman's memo book. Both contain the name of O'Donnell. It is submitted that Terman did not even know O'Donnell's name at the time of the diary entry dated September 23, 1952 (Exhibit 329). It is dated before defendant Chinn's visit with Joseph in Chicago on

October 16, 1952 (Joseph, R. 334-5; Chinn, R. 817-8). Even Joseph admits that it looks like O'Donnell's name was added after the diary entry of November 13, 1952 (Exhibit 350; Terman, R. 4004). Just when were these exhibits prepared?

Terman's memo sheet of 12-16-52 (Exhibit 379) sets forth that Needleman said he would see that Terman "was protected on commission as no deal would be made unless he knew about it." Witness Needleman denies such a statement (Needleman, R. 2790). Comparing this memo exhibit with a diary sheet of like date (Exhibit 377) and noting that witnesses Needleman and Gold (Needleman, R. 2802, 2812, 2820-3; Gold, R. 2990-1) claim that although they knew, they did not advise Terman of O'Donnell's name as a prospective purchaser in July of 1953, is it surprising that appellees surmise that like Exhibit 301, Exhibit 379 was prepared long after the date it bears to prove the point that Needleman would protect Terman on commission.

Terman testified that Exhibit 302 was the notes he made at the home of Mr. Needleman on or about March 22, 1952 (Terman, R. 1283-4) and that he got the paper on which it was written at Mr. Needleman's home "as close as I can remember it" (Terman, R. 1283). However, faced with the phone numbers for Joseph contained therein and the reference to Joseph's Chicago bank, he quickly denies ever saying it was prepared at Needleman's home (Terman, R. 1283-5). When was this exhibit created?

While appellant made much of Terman's memo exhibits in the depositions, and considerably less at the

time of trial, it is not surprising that they come in for very little comment by appellant in his brief. But, obviously Joseph's testimony was patterned after his own memos (the incredibility of which is hereafter commented on), and Terman's, even when they just didn't fit the facts, such as Exhibit 404 (the March 10, 1953, memo having to do with getting Price into the woods), and Exhibits 386 through 389, (the memo of December 22, 1952 having to do with the ordering of the car of lumber) (Joseph, R. 2437-50).

Terman's memos are unreliable and incredible hearsay undeserving of the court's consideration.³⁷

2. Purely exploratory nature of conduct of parties

a. *Attempts to find out first what was for sale*

Appellant characterizes the first meeting with the agents of Kinzua's stockholders on November 19, 1952, as a meeting to start negotiations for "the purchase of the multi-million dollar Kinzua lumber empire" (Appellant's Opening Brief, p. 12), rather than as

³⁷ In *Quon, et al., v. Niagara Fire Ins. Co. of New York, et al.*, 9 Cir. 1951, 190 F.2d 257, 260, this court quotes with approval from Wigmore on Evidence as follows:

" . . . it needs to be insisted, in opposition to the popular and natural view which tends to thrust itself forward at trials, that *a writing has no efficacy per se*, but only in consequence of and dependence upon other circumstances external to itself. The exhibition of a writing is often made as though it possessed some intrinsic and indefinite power of dominating the situation and quelling further dispute. But it needs rather to be remembered that a writing is, of itself alone considered, nothing,—simply nothing. It must take life and efficacy from other facts, to which it owes its birth; and these facts, as its creator, have as great a right to be known and considered as their creature has There is no magic in the writing itself. It hangs in mid-air, incapable of self-support, until some foundation of other facts has been built for it.' 9 Wigmore on Evidence, 3rd Ed., 5."

what it was in fact, a meeting with authorized representatives of the sellers in an attempt to find out *what was for sale* (Joseph, R. 374-5; O'Donnell, R. 1625). The real nature and purpose of the meeting is illustrated by:

- (1) the fact that when Joseph, on his way to his annual winter vacation in California (Joseph, R. 520-1), met O'Donnell and Chinn in Portland to attend the November 19th meeting with Coleman and Casey (the sellers' agents), for practical purposes all that was known about Kinzua was that the property was for sale (Joseph, R. 374-5); and
- (2) the fact that during the November 19th meeting, the sellers' agents made clear that, as a matter of policy they would not negotiate with O'Donnell, Chinn, Joseph, or anyone else until satisfied that he or they acted as principals, that he or they had sufficient operating capabilities and financial resources to purchase and operate the properties, and until he or they deposited \$600,000 as earnest money to inspect and investigate the properties (Joseph, R. 377-9; O'Donnell, R. 1632, 1634).

At the meeting itself, only the barest outline of *what* was for sale was given (O'Donnell, R. 1631-6). The quality and volume of the timber which was obviously the underlying asset, could not be ascertained, assessed or appraised in a Portland hotel room (O'Donnell, R. 1635-6).

O'Donnell's contacts with the sellers' agents and the Kinzua properties from the November 19th meeting until about April 21, 1953, were essentially, if not entirely, directed at "window shopping." Before he could determine if he wanted to negotiate, it was essential to

know for *what* he would negotiate (Dunn, R. 1031-2, 1039; O'Donnell, R. 1729, 1734-5, 1754).

Among the factual matters bearing on the exploratory phases of O'Donnell's attempts, after the November 19th Portland meeting, to find out *what* in fact was for sale, and from that to determine whether he wanted to negotiate for its purchase, are the following:

1. O'Donnell met with his bankers to canvass possibilities of getting information concerning Kinzua, its assets and properties (O'Donnell, R. 1665-9; Chinn, R. 938-42, 945-9; Dunn, R. 1058).
2. On December 3, 1952, O'Donnell advised sellers' agents, Coleman and Casey, that he would not pay \$600,000 "to look at any patch of timber" (Chinn, R. 953; O'Donnell, R. 1679).
3. O'Donnell's bankers arranged a meeting with Kinzua's banker, at which sellers' agent Coleman on December 11, 1952, gave O'Donnell permission to inspect the Kinzua properties without the deposit of \$600,000 (O'Donnell, R. 1698; Dunn, R. 1024).
4. O'Donnell, for first time, visited the Kinzua properties on December 16, 17 and 18, 1952, but due to weather conditions he was unable to inspect the main bodies of timber (O'Donnell, R. 1765, 1773).
5. The quality and condition of timber observed (O'Donnell, R. 1770-3, 1784-5), problems of effecting operating changes deemed requisite (O'Donnell, R. 1784-6), and the state of health of O'Donnell's wife (O'Donnell, R. 1924-30, 1937), together with the lack of interest of Kesterson, whom O'Donnell had taken with him on the examination trip as a potential investor and mill operator (O'Donnell, R. 1775-7), caused O'Donnell to determine not to pursue the Kinzua matter (O'Donnell, R. 1796). On

December 19, 1952, O'Donnell advised both sellers' agent Coleman and Joseph of this decision (O'Donnell, R. 1777-9, 1783-4).

6. O'Donnell's interest in Kinzua was somewhat revived during early January, 1953, by reason of improvement in his wife's health (O'Donnell, R. 1814-5), the possible investment interest of another experienced lumberman (O'Donnell, R. 1424-7, 1814-5, 1826-7), and the possibility of equity participation by A. C. Allyn, Chicago investment banker (O'Donnell, R. 1817). Arrangements were made in late February or early March with the sellers' agents for a timber examination as soon as snow conditions would permit (O'Donnell, R. 1832-6), and in late March O'Donnell received a favorable report on the Kinzua timber from Mr. Price, a timber engineer (O'Donnell, R. 1836-9).
7. In order to determine whether negotiations for the purchase of Kinzua should be commenced, O'Donnell advised others with whom he had discussed Kinzua of the good timber report, and asked if they were interested in proceeding as potential investors (O'Donnell, R. 1839-41, 1947-8; Marshall, R. 3354). He arranged with the sellers' agents for a further inspection of the Kinzua plant site (O'Donnell, R. 1949-51; Marshall, R. 3354-5), and for a meeting on April 21, 1953, to commence negotiations (O'Donnell, R. 1852; Marshall, R. 3355-6). From that date forward, negotiations proceeded to an eventual conclusion on August 17, 1953 (Dunn, R. 1031-2, 1037-9). Prior to that date, activities were limited to finding out *what* was for sale (Dunn, R. 1039).

It is submitted that not only was the matter simply in an exploratory stage on the occasion of the November 19, 1952, meeting with sellers' representatives, but that

it remained so at least until April 15, 1953. When Joseph claimed to have entered into his joint venture agreement with O'Donnell, they had not even decided to negotiate for the purchase of Kinzua but were in Portland, as O'Donnell quoted Joseph, only to "find out what it is all about" (O'Donnell, R. 1625).

b. Joseph's lack of knowledge about Kinzua belies his story

Appellant in his argument claims that Joseph had "access to a unique and valuable opportunity to acquire an enormously valuable timber empire on extremely favorable terms" (Appellant's Opening Brief, p. 9), and that he at all times intended to and was "eager to enter on the purchase of this great enterprise" even prior to talking to Chinn or O'Donnell or to the sellers' agents on November 19, 1952 (Appellant's Opening Brief, p. 11). Not only does appellant contend that from the very beginning he intended to purchase, but likewise it is contended that the same was true of O'Donnell and that the findings of the trial court to the contrary and with respect to the exploratory nature of the November Portland meeting and subsequent discussions are erroneous (Appellant's Opening Brief, pp. 46-7).

The trial court in its oral opinion said:

"... I don't think that Mr. Joseph knew very much about Kinzua on the evening of November 18th and certainly O'Donnell knew very little about it at that time.

"It is difficult for me to believe that a man like O'Donnell who has lived as long as he has and been in business as long as he has and has stayed

out of bankruptcy as long as he has, would buy a 'pig in the poke' within a matter of a few hours of meeting a man that he never had seen before excepting sometime long prior in St. Louis and then only across the room, a man as to whom he knows practically nothing; that he, O'Donnell, would immediately and readily over a casual drink agree to a 50-50 joint purchase in a transaction that was going to run into multiple millions of dollars. I don't believe it . . ." (R. 4256-7)

About all that Joseph knew about Kinzua when he claimed his joint venture agreement was made with O'Donnell was that it was for sale and involved large timber holdings, a town and mill site and a common carrier railroad (Joseph, R. 374-5). Joseph had no experience in timber, logging, sawmill or lumber manufacturing operations (Joseph, R. 487-8). On the face of it then, Joseph was in far less of a position than was O'Donnell, an experienced timber man and lumber manufacturer (O'Donnell, R. 1406), to even hazard a guess as to whether he might be interested when and if he in fact found out what was for sale.

Little was added by the sellers' agents in the November 19th meeting to give Joseph any better idea of what his "unique and valuable opportunity" was (O'Donnell, R. 1635-6, 1774). Although after the meeting he at least knew the asking price and terms, the claimed timber volume, and net quick position, he hadn't seen and couldn't see what his "unique and valuable opportunity" was until (1) he put up \$600,000 (which he couldn't do); (2) showed he had operating capabilities (which he didn't have); (3) satisfied the sellers'

agents that he was acting as a principal (as to which we point out there is room for conjecture); and (4) demonstrated the necessary financial capabilities (which he didn't have).

O'Donnell, an experienced lumber manufacturer, clearly was in no great rush to pick up this so-called "unique and valuable" opportunity even late in March of 1953 after he had been given the benefit of checking the timber, as is apparent from the terms of the purchase agreement (Exhibit 114).

Possibly realizing the absurdity of the "eager to enter on the purchase of this great enterprise" story, especially as of November 18, 1952, appellant, at the bottom of page 26 of his brief, makes another equally absurd statement to the effect that: "... as is undenied, the Kinzua interests were only dealing with one prospective purchaser at a time. Therefore, since Joseph was the one who originally contacted the Kinzua interests through Coleman, the opportunity to deal with them was peculiarly his . . ." (Appellant's Opening Brief, pp. 26-7).

To support this "undenied" assertion, reference is made to Joseph's testimony that sellers' agent Coleman told him of a phone conversation which Coleman had with O'Donnell on December 19, 1952, in which O'Donnell told Coleman he was not going to pursue Kinzua further. Joseph further testified that Coleman told him that he then told O'Donnell that he didn't want to talk to anybody else about Kinzua; that it was Joseph's deal! (Joseph, R. 442-3).

For at least three good reasons, the trial court re-

fused to believe Joseph's hearsay testimony of Coleman's and O'Donnell's December 19, 1952, telephone conversation (Finding of Fact VII(2)):

(1) In the first place, O'Donnell, as one of the participants, refutes it (O'Donnell, R. 1779-83, 1938-9).

(2) In the second place, Coleman did, in fact, talk to others about Kinzua (Needleman, R. 2752-3; Exhibits 369, 358, 374).

(3) In the third place, appellant's counsel could have tested Joseph's version of this conversation (along with other fundamentally conflicting testimony) had he dared to accept the suggestion of opposing counsel that the depositions which they had taken of Coleman and Casey be put in the record as part of their case (R. 2001-2).

The sellers' agents did in fact advise Joseph, O'Donnell and Chinn at the Portland meeting that their policy was to deal only with principals who were prospective purchasers of operating and financial ability, and then only on payment of \$600,000 for a look (Joseph, R. 377-9; O'Donnell, R. 1634; Chinn, R. 915). *If* Joseph had passed the sellers' agents' tests and put up the \$600,000, he undoubtedly would have been in a position to negotiate for a time specified on a "unique and valuable basis"—then he might have been able "to peddle the deal" as he suggested to O'Donnell following the Portland meeting of November 19, 1952 (O'Donnell, R. 1643-5; Chinn, R. 924-5). As a matter of fact, it probably is not insignificant that Coleman would not follow up on Terman's attempt to get an entrée for Joseph (Terman, R. 1169) until O'Donnell and Chinn

had made their possible interest in Kinzua known to Terman during their Los Angeles visit of November 6, 1952 (Terman, R. 1225-6; Exhibit 340). Terman, then, for the first time, had a real live principal with which to get around the sellers' agents' known aversion for other than principals (Joseph, R. 377).

3. Joseph's financial inability belied his claimed investment interest in Kinzua

Joseph in his complaint alleges that on November 18, 1952, he undertook with the defendant O'Donnell to buy half of the twelve million dollar Kinzua purchase (Complaint, IV, R. 4-5). However, in his deposition and during trial he testified to several different versions of the alleged agreement (Joseph, R. 374, 594-6, (Dep.) 2311). All the versions were to the effect that if it looks good to ourselves (Joseph's unidentified and non-existent group), we will "raise half the money" (Joseph Dep., R. 2311) or "take half or a 50% interest" (Joseph, R. 374, 594-6). He further testified he was representing only himself in the action (Joseph, R. 589).

Joseph in his deposition and at trial claimed that he had determined to invest \$250,000 personally (Joseph, R. 483, 783) and \$250,000 on behalf of his family corporation (Joseph, R. 483). Joseph's assets during the years 1952 and 1953, the period with which we are concerned, consisted almost exclusively of his 60% to 65% interest in his family corporation and a few undivided interests in tracts of unimproved real estate in and about Chicago (Joseph, R. 701-2, 721; Fields, R. 1195-7, 1205-6). Joseph had borrowed almost the full amount

of the cash surrender value of his life insurance policies (Joseph, R. 687, 745). The largest single investment Joseph had ever made was less than \$40,000 (Joseph, R. 677-8), and his net worth in these years, exclusive of the value of his interest in his family corporate business, based upon cost of purchase of interests in the unimproved real estate ventures, was approximately \$30,000 (Fields, R. 1195-7, 1205-6). Joseph testified that he would not dispose of his family corporation (Joseph, R. 721), and that he believed in spreading out and diversifying his investments (Joseph, R. 677). Joseph borrowed from his friend Samuel C. Horowitz approximately \$30,000 in April of 1953 to make possible his investment participation with Horowitz in a real estate venture he had helped to develop (Horowitz, R. 1485-7).

Joseph's family corporation, Joseph Lumber Company, was engaged in a wholesale and retail lumber yard business in the city of Chicago (Joseph, 315-6). Because of condemnation of a portion of its main yard, Joseph Lumber Company was required over a period of years from 1951 to 1955 to purchase a building site and to construct appropriate facilities (Callner, R. 2139-43). \$250,000 mortgage bank financing of said company was required for such purpose (Joseph, R. 751-4). Its financial condition in 1953 clearly did not justify outside investments (Joseph, R. 756-8).

Neither the family corporation nor Joseph had ever had experience in the operation of lumber mills or logging operations (Joseph, R. 314, 487-8).

It is more than clear from this financial picture alone

that Joseph had no intention or capability of investing, as he testified, a total of \$500,000, or any small part thereof, in the Kinzua picture.

VI.

Analysis of Claimed Admissions of O'Donnell, the Ballooned Exhibits and Appellant's Documentary Evidence

Appellant concludes his brief by saying that—

“... We think that the evidence herein cited overwhelmingly establishes, *largely from the admissions of the defendants and from documentary evidence*, that the findings, conclusions of law . . . , insofar as they purport to find against the formation and continuing existence of a joint venture between O'Donnell and Joseph . . . are clearly and manifestly erroneous.” (Appellant's Opening Brief, p. 90) (Emphasis supplied)

Appellant, then, bases his case on what he labels “admissions” and “documentary evidence” and relies upon such “evidence” to upset the trial court's findings, and to carry the heavy burden of proving the right to a constructive trust by reason of joint venture. At pages 45 to 55 hereof, we point up the untenable character of appellant's attempt by erroneous assumptions and already discredited interpretations to find a legal basis to get around the trial court's findings.

The trial court's observation in his opinion as to documentary evidence was as follows:

“I don't think there ever was so much as a full-length or formal letter, and none of Joseph's notes express any terms of an agreement between them, recite it, or even refer to it. I can't imagine that

Mr. Joseph is so guileless that he would be involved in a deal of this magnitude with a man that he had very little acquaintance with, without at least dropping him a letter expressing pleasure at meeting him and confirming an agreement made, or in some way or other making some recital of the essence of it." (Oral Opinion, R. 4257-8)

In light of the fact that as of December 20, 1952, Joseph expressed the possibility that O'Donnell was attempting to "shake him out of the deal" (Terman, R. 1363-4; Joseph, R. 589), the significance of the quoted portion of the trial court's opinion is further accentuated. Certainly, he would not, under such circumstances, have proceeded as he did if his interest was as he claimed and he was suspicious that O'Donnell might be trying to "shake him out".

There are in fact no documents or admissions as claimed by appellant.

A. Claimed Admissions

The claimed admissions and items labeled as "undenied facts" consist of a mixed bag of fact and fancy, none of which are admissions in the legal sense.

At pages 9, 10 and 11 of appellant's opening brief the claimed admissions and the largely denied "undenied facts" are first summarized and thereafter referred to time and time again. The following are comments on each as they appear on those pages:

1. It is a fact, of course, that Joseph brought Kinzua to Chinn's and O'Donnell's attention, and arranged the first meeting on November 19, 1952, with sellers' agents. If Joseph were claiming a finder's fee, and if

he had not represented himself as a principal, this might be a significant fact. With A. C. Allyn, on December 30, 1952 his cloak appeared to be that of one seeking a finder's fee (Allyn, R. 2879). There the fact might have been important.

The non-existence and ridiculous character of Joseph's so-called "unique and valuable opportunity" with respect to his knowledge that Kinzua was for sale, which at page 26 of his brief appellant claims was un-denied, was discussed at pages 77 to 81 hereof.

2. On or about December 10, 1952, O'Donnell's attorney, Dunn, outlined to Joseph in a general way a possible plan of operation at Joseph's request to provide him with "ammunition" with which to approach possible Chicago investors (Dunn, R. 1009-12). (See also pp. 106 to 107 hereof.) Appellant's claim that anything different was admitted is false.

3. O'Donnell did not immediately after the meeting with Kinzua's representatives on November 19, 1952 confer with his bankers about financing, as claimed by appellant; he did confer with his bankers in an attempt to use their services in finding out something about Kinzua without the payment of \$600,000.00 (O'Donnell, R. 1665-9; Chinn, R. 938-42, 945-9; Dunn, R. 1058) (Exhibit 360). The results were successful and eventually led to O'Donnell's being able to investigate the property and get further facts without the prior deposit of \$600,000.00 (O'Donnell, R. 1681-4, 1698; Dunn, R. 1021-4). Another purpose, of course, in going to the banks was to convince Coleman and Casey, as they insisted must be done before they would negotiate, that

in O'Donnell and the Wymans they were dealing with people of integrity, means and operating ability (O'Donnell, R. 1684, 1698; Dunn, R. 1021-2).

4. Next, appellant's counsel comes up with his real "whopper"—he assumes the existence of a joint venture—stating Joseph's testimony "that Joseph and his group would take a 50% interest, and O'Donnell and his group would take a 50% interest," is undenied. But counsel's claim is untrue—Joseph's statement was denied by O'Donnell (O'Donnell, R. 1653-5), and by Chinn (Chinn, R. 905).

This denied testimony of Joseph's, which was found by the trial court to be "incredible and untenable" (Oral Opinion, R. 4261), has been the subject of much comment elsewhere in this brief (pp. 152 to 162 herein). We simply observe here that even in the realm of wishful thinking, appellant's counsel avoid discussing its ambiguous, equivocal, illusionary implications.

Because O'Donnell and Chinn, some 34 months later, could recall only vaguely having been with Joseph at the University Club and later in a night club during the evening of November 18, 1952, appellant's counsel would contend for a rule of evidence that anything that Joseph said during that evening became an undenied fact despite the testimony of both Joseph and O'Donnell that the only discussion relative to the Kinzua purchase prior to the meeting with sellers' agents in Portland on November 19, 1952, was Joseph's statement (made immediately prior to the meeting) that "We will just go upstairs" and find out what it is all about (O'Donnell, R. 1625).

There is ample reason to believe that Joseph's testimony of the events of November 18, 1952, was at best his recreation of a recollection equally as vague as that of Chinn and O'Donnell. As late as June 23, 1954, Joseph, in behalf of Terman, wrote to a Seattle attorney stating that his *notes* indicated that the dinner with Chinn and O'Donnell at the University Club occurred *after* the meeting with the sellers' agents (Exhibit 533). Just when Joseph's "recollection" was again re-created by placing these events *before* the meeting with Kinzua's agents, is unexplained. However, the motive for the revised recreation is clear. O'Donnell and Chinn testified in their depositions taken in September, 1955, that O'Donnell left Portland by private plane for Sacramento immediately after the meeting with the sellers' agents on November 19, 1952, and the plane's log corroborated this testimony. Hence, Joseph realized before his deposition in October, 1955 that there could have been no dinner with O'Donnell at the University Club on the evening of that day.

O'Donnell's and Chinn's depositions likewise supplied an opportunity which he quickly grasped. They testified that they could not recall meeting with Joseph on November 18th. How then, he may have reasoned, could they deny what he testified occurred on that evening?

But, it is difficult to understand how the memory of a man who contends a multi-million dollar joint venture had been created would have to so recreate the events. And where in any event are Joseph's notes that "indicated" the University Club dinner was on November 19th?

The observations of the trial judge seem appropriate at this time:

"... I can't believe and don't believe that Chinn and O'Donnell are such scoundrels and so stupid as originally by deposition to have denied meeting Mr. Joseph the evening of November 18 when in fact they remembered the meeting. It would be ridiculous, in the light of the telegram, hotel registration, and other records of the event which they must have had in mind if they actually remembered the meeting. Moreover, if both of them were that foolish and dishonest, I can't imagine that their counsel would have been so during this period of about a month before the depositions, while they were, according to Mr. Clinton, rehearsing and drilling Mr. O'Donnell and Mr. Chinn for their testimony. I gather the impression that Mr. Clinton feels that Mr. O'Donnell at least went through quite an educational period prior to his deposition. I can't imagine that these counsel would be so inadequate to the situation as not to inquire whether they registered at a hotel or whether they sent any telegrams or whether they had signed any chits. Even if I thought Mr. O'Donnell and Mr. Chinn to be as untrustworthy as the plaintiff contends they are, I couldn't believe them to be so unwise as to deny what they must have known could easily and indisputably be proved." (Oral Opinion, R. 4254-5)

5. Next, we consider the claim that O'Donnell gave Joseph information about newly discovered facts concerning Kinzua. The fact is that O'Donnell did call Joseph a few times after the Portland meeting, and did give him information that he (O'Donnell) had discovered about Kinzua. Joseph, on the contrary, did not

initiate a contact with O'Donnell after mid-December, 1952. (Joseph's letter of February 27, 1953 (Exhibit 52) merely acknowledged O'Donnell's phone call and enclosed a pessimistic forecast of economic conditions in the Northwest lumber industry (Exhibit 46)). Consistent with A. C. Allyn's testimony of his impression that Joseph's interest in Kinzua on December 30, 1952 was that of a broker (Allyn, R. 2879), was Joseph's response to O'Donnell's last phone call to him on March 31, 1953 when O'Donnell asked him, "Now, let's get it straight. How are you? Are you with the Allyn people?" (O'Donnell, R. 1947). Joseph replied, "Yes, I am with the Allyn group. I will be right along with them. You do your business with Marshall" (O'Donnell, R. 1841).

While O'Donnell had no understanding with Joseph and was under no obligation to him, or vice versa, O'Donnell did in fact give Joseph every reasonable opportunity, if he wished it, to participate in the Kinzua acquisition.

6. The next so-called "admitted fact" of which much is made is that the Seattle group "could not finance the entire purchase." Although there is no testimony to that effect, the record does indicate that O'Donnell never contemplated investing more than \$500,000 of the down-payment, the Wymans \$1,500,000 and Stuchell \$500,000 (O'Donnell, R. 1433, 1948; Dunn, R. 1079). Certainly the balance of the required funds had to come from some place. Had Joseph wished to participate in the purchase, his participation would undoubtedly have been welcomed.

The *admitted facts* are that at no time did Joseph agree, promise or offer to participate in Kinzua's purchase; nor, with the exception of A. C. Allyn, did he ever advise O'Donnell of the names of any potential investors nor that he had any investors who were interested in Kinzua; nor did he ever indicate to O'Donnell any possible dollar amount or percentage of participation which he or any other persons might possibly invest in Kinzua's purchase (Joseph, R. 555-6; O'Donnell, R. 1645, 1841, 1867-8, 1947-8). As Joseph stated on March 31, 1953, his interest was with Allyn (O'Donnell, R. 1841, 1947).

7. Appellant next asserts as an "admitted fact" that there was some agreement or understanding between Joseph and O'Donnell that they would "sit down and allocate." Not even Joseph testified that there was any such agreement — appellant's counsel's assertion is based upon a distorted interpretation of O'Donnell's testimony and supported by quotations taken out of context (Appellant's Opening Brief, pp. 33-4). O'Donnell's testimony in this respect is only to the effect of what would have been done, not what was said; clearly, all that O'Donnell had in mind was that obviously if Joseph interested anyone of his Chicago acquaintances, or was interested to some extent himself, all interested buyers, as of the time the matter was no longer in the exploratory stage, would have to agree between themselves what portion of the down payment each would take (O'Donnell Dep., R. 3553-6; O'Donnell, R. 1733-6).

8. Appellant next asserts that "undeniedly, Joseph

worked in Chicago to secure, and did secure, qualified, responsible and fully adequate investors . . .” Since Joseph’s claim that he had secured investors was not asserted in his complaint in this suit (Complaint, R. 3-9) or otherwise made known to appellees until Joseph’s deposition was taken in Chicago in October, 1955, it could not very well have been formally denied in their pleadings. It has never been admitted by them. There is only one admitted fact with respect to Joseph’s claimed investors, and that is *Joseph’s admission that he never told O’Donnell, any of the other defendants, or Allyn, that he had one cent committed or even possibly available from any one or anybody, including himself* (Joseph, R. 555-6).

Joseph’s implausible recital of circumstances under which commitments of a quarter of a million to one million dollars were purportedly made to him, even before the Portland meeting of November 19, 1952 (Joseph Dep. 2346-53) when he only had “a sketchy outline of the deal” (Joseph, R. 375); a critical evaluation of the testimony of his alleged investors (Chesrow, R. 1507-25; Hoffman, R. 1100-45; Horowitz, R. 1479-1525; Horowitz Dep., R. 4195-7; Lancaster, R. 4228-45; Platt, R. 4206-28; Perlstein, R. 4198-4206; Morris, R. 4170-94); and the existence of incidents creating further doubt about the accuracy of their testimony, ³⁸ together with Joseph’s non-disclosure of

³⁸ Appellant states on page 58 of his brief that Hoffman “discussed Kinzua with Joseph in November of 1952 (Hoffman, R. 1101) and *firmlly and definitely committed himself to invest \$250,000*, upon the judgment of Joseph (Hoffman, R. 1107).” And Hoffman did so testify, but Joseph in his letter to Terman of August 27, 1953 says, “As a matter of fact, I had a talk with Sol Hoffman, who no doubt you know,

their existence to O'Donnell or Allyn, can only lead one to conclude that Joseph's "investors" were not committed to invest as Joseph claimed.

9. Next, appellant, as part of his so-called admissions, takes isolated portions of the March, 1953 incident involving Joseph's strangely misdated memo of March 10, 1953 (Exhibit 404) (commented upon at pp. 114 to 117 hereof) in an attempt to create an inference that Joseph was told by O'Donnell that *a cruise* was required (Appellant's Opening Brief, p. 43). Joseph's testimony on this point at the trial was categorically denied by O'Donnell (O'Donnell, R. 1841-4), is contrary to the court's finding and the credible evidence (Oral Opinion, R. 4259), and contrary to Joseph's deposition testimony (Joseph Dep., R. 2507). For the reasons stated in the above-referred to comment elsewhere in this brief covering this exhibit, appellees submit that the word "cruise" was first placed in Joseph's mind just before the trial. Joseph obviously did not know what a cruise was (Joseph, R. 610-1), had not used the word in his deposition (Joseph Dep., R. 2507), in his memo of March 10, 1953 (Exhibit 404), or in his report to Terman (Exhibit 407). As stated at pages 116 to 117 hereof, Joseph, faced just before trial with incontrovertible evidence establishing that O'Donnell was in Palm Springs, California, not Seattle, from January 18 to March 23, 1953 (Exhibit 639), and that in particular, he was playing golf and was at the

and with whom I have discussed this deal, having in mind that *if he felt the deal was good enough, he might even take a position in it.*" Apparently Joseph didn't think on August 27, 1953 that Hoffman was committed as he and Hoffman testified in 1956!! (Emphasis supplied) (Exhibit 87)

Racquet Club in Palm Springs in the afternoon and evening of March 10, 1953 (Exhibit 638), it became obvious that Joseph's deposition testimony about the March 10, 1953 memo (Exhibit 404) was insupportable. Since O'Donnell had testified that he had called Marshall of A. C. Allyn & Co. on March 30, 1953 and Joseph on March 31, 1953 to advise them of the favorable Price report (O'Donnell, R. 1839-41), it took the "cruise story" that it would take months to examine every acre (Joseph, R. 467) to excuse Joseph's inexplicable silence (and Terman's also) from then on (Joseph, R. 645).

10. Appellant next states that it was admitted that the Kinzua financial statements were not obtained for "weeks" after the last telephone call by O'Donnell to Joseph in March, 1953, and that it was "further months until the essential cruise or inspection of the timber was obtained" (Appellant's Opening Brief, p. 10). Although appellees are at a loss to understand why this is significant, or even pertinent, apparently appellant urges that it somehow supports Joseph's explanation, advanced for the first time at the trial, for his complete silence and inaction from the end of March, 1953 until after he learned of Kinzua's purchase at the end of August.

The fact is that the Kinzua financial statements were obtained by Marshall, with whom Joseph had asked O'Donnell to cooperate (Joseph, R. 557-8), from the sellers' agent Coleman on April 21, 1953 (O'Donnell, R. 1852; Marshall, R. 3371-5), just three weeks after O'Donnell's last call to Joseph. O'Donnell was not

concerned with or impressed by the statements (O'Donnell, R. 1853), and secured them from Marshall only after Allyn withdrew its consideration of Kinzua (Marshall, R. 3381). There is no showing whatsoever that the statements were favorable; in fact, Marshall testified that they would require a lot of explaining (Marshall, R. 3374; Exhibit 564). They obviously did not impress Allyn; he "dropped out" within the week after they were made available (Allyn, R. 2875).

The "cruise" which appellant, at the very late date of the trial, invented to explain his silence of more than four months after being notified that Allyn was dropping its consideration of Kinzua, was never made.³⁹ Joseph testified that the "cruise" he was talking about required an examination of every one of the 110,000 acres of Kinzua timber (Joseph, R. 610-1) which would take several months to complete (Joseph, 608-9). When and by whom this cruise theory was suggested is not disclosed. It does not appear in his discredited March 10, 1953 memorandum (Exhibit 404), which on deposition he testified was the sole basis of his recollection that he even had a conversation with O'Donnell in March, 1953 (Joseph Dep., R. 2507). He further testified that he had no recollection of the conversation except as appeared in the memorandum itself (Joseph Dep., R. 2507). When asked upon cross-examination "when did you first think of that [the cruise] as an explanation for not having called O'Donnell after the March call," Joseph replied, "I just don't recall now when did I first think about it" (Joseph, R. 609).

³⁹ The appellees caused a "check cruise" requiring only a few weeks to be made of the Kinzua timber in June, 1953.

We suggest that appellant's "cruise" story was born of his counsel's desperation to find some conceivable excuse for the silence of Joseph (and his associate Terman) after Allyn called and told him he was dropping the matter, which silence, without more, refutes and renders untenable Joseph's position.

11. Lastly in the list of appellant's claimed admissions is the subject matter of the inflated bulge in the middle of appellant's opening brief. In tabloid taste and style at pages 59 and 60, appellant's counsel blow up two letters (Exhibits 93 and 87), using therefore the paper equivalent of 48 pages of brief.

B. Ballooned Exhibits

1. Exhibit 93—O'Donnell's September 22, 1953 letter

The first of these (Exhibit 93) is a letter dated September 22, 1953 from O'Donnell to Joseph in reply to Joseph's letter of August 31, 1953 (Exhibit 90) which the trial judge characterized "as a nice letter to O'Donnell" (Oral Decision, R. 4260). Joseph's letter, written after he had read of the Kinzua purchase, inquired of O'Donnell concerning the Kinzua purchase. Appellant's counsel, as he does in his opening brief, tried to make much of O'Donnell's reply before the trial court, who in his oral opinion stated with respect to it:

"It certainly is clear that O'Donnell didn't take any counsel from anyone before he wrote it. He just dashed it off . . ." (Oral Decision, R. 4260)

Assuredly, O'Donnell's reply of September 22, 1953 is not a letter that would have been written had O'Donnell any thought or suspicion that Joseph claimed to be

a joint venturer with him (O'Donnell, R. 1908-9). Terman, upon reading O'Donnell's letter, described it as "a pretty frank statement . . . but what can be done in the sense of having something tangible to hang our hats on to substantiate *our claim for compensation*, I don't know . . . I believe you should pursue the matter further with O'Donnell without too much delay". . . (Emphasis supplied) (Exhibit 96). Joseph "pursued the matter" 20 months later by asserting his 50% claim of joint venture as a means of "substantiating our claim for compensation" (Exhibit 117).

Assuming that A. C. Allyn had not called Joseph to advise him that he and his associates "were getting out,"⁴⁰ the reference in O'Donnell's letter to the "lost interest (by your group) in the Kinzua deal because of other utility deals, et cetera," might have surprised Joseph, but it would not have misled him in any way to his detriment. Joseph knew who O'Donnell was referring to as "your group" and who had lost interest in the Kinzua deal—certainly it was A. C. Allyn & Co., who had been very much in the minds of Joseph and Terman (Exhibits 116, 55, 48). After all, way back in early January Joseph admittedly told O'Donnell to cooperate with A. C. Allyn & Co. and give them such information as he had to Marshall (Joseph, R. 557-8). In any event, the statement was not false as labeled by appellant.

Allyn testified and the trial court found that Allyn did in fact drop out on April 27, 1953 (Allyn, R. 2875-

⁴⁰ Allyn did call Joseph and so advise him on or about April 27, 1953 (Allyn, R. 2876; Joseph, R. 633-4).

6). O'Donnell had been relying upon Allyn's participation for almost half of a \$4,800,000.00 down payment. Had O'Donnell not believed in April, 1953 that Allyn would participate to that extent if Kinzua's purchase were otherwise deemed feasible, it is doubtful that he would have commenced an investigation of Kinzua or that the sellers' agent Coleman would have been receptive to his interest (O'Donnell, R. 1849, 1951-2; Marshall, R. 3361; Exhibit 564). Upon being advised of Allyn's dropping out, Coleman stated to O'Donnell, "I guess, Harry, that lets you boys out then" (O'Donnell, R. 1441). Coleman then demanded a prompt answer as to whether O'Donnell could and would go forward and required O'Donnell to call back the next day (O'Donnell, R. 1441).

Although Allyn's drop of interest in the negotiations was statedly only for some weeks, it is submitted that it was tantamount to and regarded by O'Donnell as well as Allyn as a complete drop out (Allyn, R. 2875-6; Marshall, R. 3363-4, 3379-80; O'Donnell, R. 1955).

While O'Donnell was inaccurate, as he admitted (O'Donnell, R. 1906), in saying the matter lay dormant for a couple of months, this certainly did not mislead Joseph in any way. In fact, from December 19, 1952, until the favorable report on the timber in late March, a period of some three months, the matter was essentially dormant. And O'Donnell did run into Webster in Los Angeles some time prior to O'Donnell's interest in Kinzua at which time Webster had informed him of his potential interest in such a timber transaction (O'Donnell, R. 1900, 1908). As a matter of fact, O'Don-

nell wrote this letter a few weeks after he found himself confronted with the responsibilities of what appellant's counsel refer to as "a vast timber empire" (Appellant's Opening Brief, p. 11). Not only was new management involved, the operation had to be changed, the corporations dissolved, new banking arrangements made, mortgages drafted, and the very extensive improvements to the mill which eventually increased its production from about thirty million feet to sixty million feet a year had to be planned and put into execution (O'Donnell, R. 1785-91, 1918-9, 1981-4). *Obviously, unless O'Donnell were on his guard as he would have been had he felt Joseph claimed that he was in any way a joint venturer with him, he would not attempt to recall, in accurate detail and time sequence the events of some months past.* O'Donnell, in his "dashed-off" letter, easily could have confused, *as he did*, the time sequence; but such confusion was not a designed or intentional one and it did not in fact confuse or mislead Joseph.

2. Exhibit 87—Appellant's August 27, 1953 letter

With respect to the second blown up letter (Exhibit 87), the August 27, 1953, letter from Joseph to Terman, appellant's counsel on page 60 of appellant's opening brief say that this letter discloses: "Joseph's spontaneous indignation upon discovering O'Donnell's treachery"; and "Joseph's fidelity to and his concern for Terman, who was left out in the cold by O'Donnell's maneuver"; and "Joseph's determination to obtain redress."

Certainly just what this letter shows may be a matter of much conjecture. In making our own conjectures

of its meaning, we consider with it Terman's reply of August 30, 1953 (Exhibit 89), Terman's letter to Joseph of September 18, 1953 (Exhibit 92), Joseph's letter to Terman of September 25, 1953 (Exhibit 94), and Terman's letter to Joseph of September 28, 1953 (Exhibit 96).

Aside from self-serving purposes, it would appear that Joseph felt that Terman probably knew something about the transaction and he points out to Terman, "However, it would seem to me that your friend Needleman should have said something to you about this" (Exhibit 87). After all,

- (1) Needleman, the attorney for the largest of the selling stockholders of Kinzua had told Terman originally about the fact that Kinzua was for sale (Terman, R. 1152) ;
- (2) Needleman worked with Terman and prepared a draft of a letter for Terman to send to Coleman in an unsuccessful attempt to get Coleman to contact Terman and give him information about Kinzua (Terman, R. 1165-9). Terman in his memo of September 22, 1952, refers to Needleman, "who is guiding me." (Exhibit 328) ;
- (3) Terman conferred often with Needleman relaying information Terman picked up from Joseph about O'Donnell's activities. This was a direct conduit from a prospective purchaser (See pp. 62 to 64 hereof) Exhibit 89; Needleman, R. 2752-3) ;
- (4) Needleman knew in early July that O'Donnell was one of the purchasers of Kinzua. (Needleman, R. 2820-2).

Terman in his memo of December 16, 1952 (Exhibit 379), states that Needleman "said he would see that I was protected on commission as no deal would be made unless he knew about it and would see to it that I was protected on the commission." Needleman denied that he made any such a statement or undertaking (Needleman, R. 2790). Joseph was well aware of Terman's close connection with the attorney for the largest stockholder (Joseph, R. 324-5).

In his reply to Joseph's comment about Needleman, Terman stated that he had asked Needleman for an explanation and that Needleman implied he was not aware that O'Donnell was one of the purchasers (Exhibit 89). (In fact, Needleman did know that O'Donnell was a purchaser (Needleman, R. 2820-3)). Terman further stated: "I told Jim (Needleman) that it was inconceivable that Coleman would enter into any transaction without calling you and me in as he knew that you had invited O'Donnell into the deal, after I submitted it to you." Terman next referred to the fact that Needleman knew almost from the beginning "that you had invited O'Donnell and a Mr. Chinn into the deal and that I was to receive a fee" and that, "Every time you and I had a telephone or letter communication, I would immediately advise Needleman or Gold of the facts, . . ." (Exhibit 89).

After Joseph had forwarded to Terman a copy of O'Donnell's September 22, 1953, reply to Joseph's friendly inquiry about the sale of Kinzua, Terman wrote to Joseph on September 28, 1953, stating—

"... but what can be done in the sense of having

something tangible to hang our hats on to substantiate *our claim for compensation*, I don't know . . . I believe you should pursue the matter further with O'Donnell without too much delay and I would like to hear from you at your earliest convenience." (Exhibit 96)

If Terman ever "heard" from Joseph in response to this letter, the record doesn't disclose it. Nor did Joseph pursue the matter further without too much delay. Not until some 20 months later when his Seattle attorneys made demand upon the appellees (Exhibit 117), did Joseph contact O'Donnell or any of the other purchasers, or otherwise inform them of his claim (Joseph, R. 654, 661).

From the foregoing letters the following would seem to be fair conjectures of the meaning of Exhibit 87:

1. That Joseph upon hearing of the sale and knowing of Terman's desire to find some place in the Kinzua picture from which to claim a commission was well aware that in using Joseph for this purpose Terman had picked the "wrong horse" and moved to cover up; he was aware of Terman's very close relationship with Needleman, the attorney for the largest of the selling stockholders, and felt that Terman should at least in part put the blame on Needleman. Joseph knew he had let the Kinzua matter drop after he was no longer "pushed" by Terman and that he had not told either O'Donnell or Allyn of any claim of Terman to a commission. He knew that Terman, now that a sale had been made to one whose attention he, through Joseph, had brought it, would want to claim compensation from the sellers or the buyers; and he knew that he had

worked with Terman in appearing as a principal from or through whom Terman might believe he could claim a commission.

Terman made it clear in his letter of August 30, 1953 (Exhibit 89), that he was at the very least, exasperated with Needleman for permitting a sale to be made without informing him before its consummation. From the tenor of this letter it would appear that Terman was well aware that his position from which to claim a commission through the sellers or the buyers was not a legal one, but instead, if his words could be taken at face value, that he felt that Needleman would see that a deal was not made unless he somehow or other was able to insist on a commission in some manner or other. After all, Needleman had brought Terman into the picture.

It is noteworthy of comment that in none of the letters is there any reference to Joseph's claim that he was entitled to 50% of the deal or that he had in fact notified O'Donnell of Terman's right to a commission!

2. Just what Terman meant in his September 28, 1953, letter about substantiating "our claim for compensation" is also a matter for conjecture (Exhibit 96). This would seem to be a recognition of the fact that he and Joseph were working together in some way to get a finder's fee or commission out of the Kinzua sale from somebody or other. If Allyn had come into the picture, undoubtedly Joseph would have shared any finder's fee he got with Terman. As heretofore mentioned, once Allyn came into the picture on December 30, 1952, all interest in O'Donnell seemed to disappear. By that time, through the use of O'Donnell, Joseph

had really found out what was for sale and when A. C. Allyn came into the picture, one from whom a finder's fee could be claimed was for the first time available. O'Donnell thereafter only served as the necessary one with operating experience to interest Allyn (Allyn, R. 2874-5).

However, the inexplicable absence of any further apparent interest even in Allyn after sometime in early March of 1953 remains incredible, as also does the fact that Terman and Joseph both claim that they neither heard nor knew anything about Kinzua (except possibly Allyn's withdrawal of interest, Joseph, R. 634), or made any inquiries about it from the time they last heard that O'Donnell was trying to get Price into the woods to look at the timber sometime in March until Joseph learned of its sale on August 27, 1953). Joseph, in his August 27, 1953, letter to Terman advising him of the sale, commented that certain parties in Chicago had inquired about Kinzua off and on and that he had told them that he was still waiting to hear from O'Donnell (Exhibit 87). If such inquiries had been made, and Joseph really had the interest he now claims in Kinzua, he certainly would have checked either (a) with O'Donnell, (b) with Terman, or (c) directly with Coleman when Allyn told him he was withdrawing his interest. He checked with no one. Even more probably Terman, whose avid interest in finding a place from which to claim a fee or commission from Kinzua is clear, would certainly have inquired during the long period involved from both Joseph and certainly Needleman, if he had not considered Joseph's interest and usefulness in the

Kinzua matter to have terminated with Allyn's withdrawal.

Joseph's letter of September 25, 1953, to Terman (Exhibit 94), commenting on O'Donnell's September 22, 1953, letter (Exhibit 93), states that Joseph does not know what O'Donnell is talking about when he refers to Joseph's group dropping out because of other utility deals. As we have heretofore demonstrated, Joseph knew full well what O'Donnell was talking about. Why, unless this was purely a self-serving letter, this was said to Terman is also a matter of considerable conjecture. Was Joseph trying to cover up a failure to have told Terman that Allyn had dropped out? Did he feel that he had not carried his part of their joint efforts to find a place from which to claim a fee or commission and was trying to cover up? But this explanation still leaves unexplained Terman's incredible lapse and apparent loss of interest in Kinzua. Could it be that Needleman requested his friend Terman not to interfere in an imminent sale possibility?

The very least that can be said about the blown-up Exhibit 87 is that it is the subject of many possible conjectures and more plausible explanations than those advanced by appellant.

Just as appellant exaggerated these exhibits physically, it is submitted that their significance is equally exaggerated. Even if all of appellant's inferences were assumed, there is nothing in O'Donnell's or Joseph's or Terman's letters that point up a joint venture agreement between Joseph and O'Donnell.

C. Appellant's Documentary Evidence

1. Appellant's confusion with respect to his document prepared to interest investors

The term "plan of acquisition," coined by appellant's counsel, was first used at the trial (Dunn, R. 1010). The documents so denominated were identified and admitted at the trial as Exhibits 381, 382 and 391. Exhibit 382 is merely a copy of 381. At O'Donnell's and Chinn's discovery depositions they were identified as B and A. Neither witness had ever seen them before and were clearly mystified as to their identity (Chinn Dep., R. 3238-54; O'Donnell Dep., R. 3634-6).

Subsequently, Joseph's discovery deposition was taken where these Exhibits 381, 382 and 391 were identified respectively as Exhibits 17, 18 and 16. At his deposition Joseph had at first *no idea* what these documents were, exactly how the data was acquired, to whom the documents were given and why. He first testified all three exhibits represented typewritten notes of his conference with Coleman, Casey, Chinn and O'Donnell on November 19, 1952. The information came principally from Coleman. His stenographer had copied his penciled notes of this meeting which he had mislaid or destroyed (Joseph Dep., R. 2325-42). He first testified Exhibit 391, which contained no reference to the Seattle group, was an earlier document than Exhibit 281 (Joseph Dep., R. 2335-6). He later was uncertain whether these notes in their penciled form were made at the meeting of November 19, 1952, or possibly on the plane going south to La Quinta where he planned to spend a vacation (Joseph Dep., R. 2326, 2341). He changed his

story several times in his deposition, each time extending the length of time in which they might have been prepared (Joseph Dep., R. 2377-8). He first testified he gave Allyn on December 31, 1952, Exhibit 382 which contained a reference to a Seattle group being interested in purchasing Kinzua (Joseph Dep., R. 2428). He then testified that he gave him Exhibit 381 (Joseph Dep., R. 2429, 2468). At length, under prodding by defendants' counsel, he finally was forced to reverse his earlier testimony and to admit that he "probably" gave Exhibit 391 to Allyn (Joseph Dep., R. 2468-9; Joseph, R. 552-4). Allyn, incidentally, denied receiving any typewritten material from Joseph (Allyn, R. 2872-3, 2880-1). Joseph was "inclined to believe" he gave copies of one or more of the documents to all potential investors but Perlstein (Joseph Dep., R. 2364). At the trial Joseph testified he received the "principal selling point" in the document from O'Donnell (Joseph, R. 612-3). He could not recall whether anyone else was on the line or not (Joseph, R. 613). He testified at the trial he never recalled having talked to Dunn until he met him during this litigation (Joseph, R. 409). He was "certain" (despite Dunn's testimony to the contrary) he never talked to Dunn before this litigation started (Joseph, R. 411). He testified that he gave these documents to his friends to interest them (Joseph, R. 416-428, 462-3) and, after O'Donnell withdrew, to Allyn on December 30, 1952 (Joseph, R. 448-50, 461-3). He freely admitted his earlier confusion about the copy he said he gave Allyn (Joseph, R. 552-4).

At his discovery deposition, Dunn had only a hazy

recollection of ever having talked to Joseph (Dunn, uncorrected deposition, page 38). He had, however, heard his name (Dunn, R. 3701). Before signing his deposition, Dunn made an appropriate correction of his deposition, as provided by Rule 30(e) of F.R.C.P., recalling detail of his one telephone conversation with Joseph (Dunn, R. 3726-7). At the trial, Dunn testified at some length as to how his recollection of this telephone conversation with Joseph, between December 5 and 19, 1952, had been refreshed (Dunn, R. 1009-10, 1018-19). He testified that O'Donnell told him Joseph wanted "some ammunition to try to interest people in Chicago in the possible purchase of Kinzua" (Dunn, R. 1010). Dunn, after brief investigation, gave Joseph some data he had collected on the Kinzua corporate set-up and some general thoughts he had formulated upon the possible capital gain tax features of a venture of this character (Dunn, R. 1010-1013). He had not been authorized to explore the subject and had only a "general picture" which he conveyed (Dunn, R. 1031-32; 1044-5). O'Donnell corroborated Dunn (O'Donnell, R. 1708-11). The trial court accepted the Dunn-O'Donnell version of the source of the so-called "plan of acquisition" (Finding of Fact V(5), R. 256).

From the foregoing, the following points seem obvious:

- (a) Joseph first thought he had prepared and presented these documents to Chinn and O'Donnell at an early stage in the proceeding to interest them. When faced by the ignorance of Chinn and O'Donnell as to the documents, he shifted his position.
- (b) Next, he thought they were merely typed copies of

his notes of the meeting held with Chinn, O'Donnell, Casey and Coleman in Portland, Oregon, on November 19, 1952.

- (c) Next, he decided that, as the documents obviously referred to incidents which occurred several weeks after the November meeting, they must have been prepared long after his return to Chicago.
- (d) It finally dawned on Mr. Joseph that he must have used the documents in some way and probably gave them to persons he was trying to interest. He still was uncertain why one referred to a Seattle group and one did not.
- (e) Finally, he realized that Exhibit 391, rather than Exhibit 381, was given to Allyn because by then Joseph had been told by O'Donnell that he was no longer interested. Thus, he planned to substitute Allyn for O'Donnell.
- (f) It seems incredible that plaintiff, who claims for over two years before bringing this action that he had a (1) binding contract with O'Donnell, (2) a firm commitment for over 3 million dollars from Chicago investors, and (3) a determination from the outset to hold O'Donnell liable for his alleged breach of trust, *could not even identify from his own file the source, purpose and use of the prospectus on which he claims to have raised the money.*
- (g) The *only explanation* is that the casual telephone call, the casual typewriting of the outline of a possible deal, the casual distribution of it to a few people, was never more than a subject of discussion—soon forgotten.
- (h) If these documents were of any real significance, why were not copies sent to O'Donnell and Dunn for their information and to corroborate the information conveyed only by telephone?

Not improbably, Exhibit 343, a handwritten slip setting forth timber acreage, and volume, were Joseph's only notes of the November 19, 1952, Portland meeting with Coleman and Casey. Joseph's testimony that these were notes of a phone conversation with Coleman on November 7, 1952, is no more reliable than his first answers that the document prepared in December to interest investors were his notes of the November 19th meeting!

a. Down payment confusion

At the trial Joseph testified sellers' agent Coleman stated at the November 19, 1952, meeting in Portland that the down payment required to purchase Kinzua would be \$6,000,000 (Joseph, R. 378-9). During his deposition, he testified first that Terman had told him on October 24, 1952, that the down payment required would be \$4,800,000 (Joseph Dep., R. 2250); next he testified that he learned of the \$4,800,000 figure from Coleman during the November 19th meeting (Joseph Dep., R. 2320, 2331). When confronted with Exhibit 381, which he claimed at that time were notes of the November 19th meeting, Joseph then testified that both \$4,800,000 and the \$6,000,000 figures were mentioned (Joseph Dep., R. 2332).

Later in his deposition, however, he changed his testimony yet again stating that only the \$6,000,000 down payment was mentioned on November 19th and that he had gotten the \$4,800,000 figure from looking at O'Donnell's deposition (Joseph Dep., R. 2376-7, 2424). He further testified that he had no independent recollection of the matter and that he would rely upon Exhibits 381

and 391, which he claimed were his notes of the meeting (Joseph Dep., R. 2376-7). Still later in his deposition, he repeated that he was basing his testimony that \$6,000,000 was the down payment named in the November 19th Portland meeting upon his notes of the meeting (Exhibits 381 and 391), *and nothing else* (Joseph Dep., R. 2424-5).

From the foregoing, it seems clear that Joseph's testimony of the November 19, 1953, meeting with the sellers' agents Coleman and Casey was mistakenly based upon the erroneous assumption that Exhibits 381 and 391 were memoranda of that meeting and that Joseph had no independent recollection of it. But, as appellant's counsel concede on page 10 of Appellant's Opening Brief, Exhibits 381, 382 and 391 were not notes of the November 19, 1952, Portland meeting. They were what appellant's counsel label the "plan of acquisition" framed by O'Donnell's attorney Dunn and communicated to Joseph in mid-December, 1952 (Dunn, R. 1010-2) (Also, see preceding section, pp. 106 to 107).

Under these circumstances, Joseph's entire testimony of the November 19, 1952, Portland meeting is, to say the least, unreliable and indicates a strange memory of significant fact for a man who claims he was bound with another as a joint venturer to acquire a multi-million dollar property.

2. Exhibits 386, 387, 388, 389—some queer aspects of appellant's memo of 12-22-52

In the subject memo Joseph purports to set forth the contents of a phone call with Coleman which he claims occurred on December 19, 1952, three days before the

date of the memo. At his deposition, Joseph testified that he wrote this memo in longhand because his secretary was poor, and that she typed it on its date, December 22, 1952 (Joseph Dep., R. 2438). At the trial, he testified that he dictated the memo to his secretary who typed it on its date (Joseph, R. 436-7). The memo is extraordinary for two reasons:

- (a) It refers to Joseph's ordering a car of lumber from Coleman but we know from other sources⁴¹ that the car of lumber was not ordered until December 26, 1952—some four days after Joseph insisted he wrote the memo!
- (b) It makes no mention of O'Donnell's advising him he was no longer going to pursue the Kinzua purchase, yet we know from the testimony and exhibits furnished by Joseph's own witnesses⁴² that Joseph

⁴¹ (a) In a transcript of a telephone conversation of December 23, 1952, between Casey and Gold (Needleman's law partner and Joseph's and Terman's conduit), Gold said:

"As a matter of fact, I think he, Joseph, asked [during the conference call of December 20, 1952 (Exhibit 433-C)] if he could somehow or other get a car of lumber shipped from Kinzua to his place in Chicago, so he could see for himself something about the quality of the lumber . . . and that Joseph had asked that we try to get the lumber shipped to him so that he can see for himself on that score. . . ." (Exhibit 43)

(b) Joseph could only substantiate his claimed telephone call to Coleman on December 19, 1952, by a telephone bill showing a call to "Sea" on that date. When shown that this was also an accepted abbreviation for Seattle, he had no comment (Joseph, R. 569-72).

(c) The car of lumber was confirmed by Kinzua December 30, 1952 (Joseph, R. 546). Callner (an employee of Joseph Lumber Company) testified an order for lumber is usually confirmed in a couple of days after an oral order (Callner, R. 2131-3).

⁴² In a "conference" telephone call on December 20, 1952 (Joseph, R. 575, Exhibit 433-C), between Joseph, Terman and Needleman, Joseph was quoted as stating O'Donnell had given as an excuse for "passing up the deal" the poor quality of the timber (Exhibit 423). Terman testified that O'Donnell gave his wife's illness as an excuse for "passing up" the deal to Coleman, and the quality of the timber as an ex-

was well aware on December 22, 1952, that O'Donnell had told him in his phone call a few days before that he was not going to pursue Kinzua further.

Everything in this memo was a correct statement of fact as of early January, 1953, and had it borne a date as of that time, it would have been correct. Why then did Joseph cling to his story that it was a memo of a December 19th conversation? We suggest that the reason may be that had Joseph admitted the obvious fact that the date in his memo was erroneous, difficult and embarrassing questions about when, how, and under what circumstances the memo obtained its most peculiar date would have been raised.

3. Exhibit 393—appellant's memo of 12-29-52

This exhibit, purporting to be a memo of a conversation Joseph had with Coleman on December 26, 1952, quotes Coleman as having told Joseph the following:

“However, he [O'Donnell] said to Coleman, you know I have had several men out here in on this deal with whom I had discussed same, and wanted to know if it was alright with Coleman to turn this deal over to them who might be interested, and Coleman said that he didn't want to discuss the deal with anybody at this time because it was Joseph's deal, and until such time as Joseph told him he had no interest, he didn't care to discuss it with anyone. However, he said that when Joseph told him he was off the deal, he might call him (O'Donnell).”

cuse to Joseph, and that this was the subject of some comment (Terman, R. 1251-2, 1361-4). Also, in an actual transcript of a telephone conversation of December 23, 1952, between Casey (one of the sellers' agents) and Gold, there is a discussion at some length of the confusion apparently created by O'Donnell's not giving Joseph and Coleman the same reason for “passing up” the deal (Exhibit 43).

Credible testimony and exhibits in the record demonstrate that this version of Coleman's December 19, 1952, telephone conversation with O'Donnell is false.

It is undisputed that O'Donnell called Coleman on December 19, 1952, and advised him that he (O'Donnell) had determined not to pursue the Kinzua matter (O'Donnell, R. 1777-9; Exhibits 43 and 423). That he did so is clear from this very exhibit of Joseph's.

O'Donnell, apologetic for having taken the Kinzua sellers' agent's time, then asked Coleman as a matter of courtesy whether he would like him (O'Donnell) to bring the fact that Kinzua was for sale to the attention of the Georgia-Pacific Lumber Company with whom he was acquainted through its bankers, Blyth & Company (O'Donnell, R. 1779-81; Exhibit 43). O'Donnell had no financial or other interest in Georgia-Pacific (O'Donnell, R. 1939). Sellers' agent Coleman responded that he would be interested in O'Donnell's referring the matter to Georgia-Pacific (O'Donnell, R. 1781) and O'Donnell thereafter did so (O'Donnell, R. 1782-3, 1938-9).

O'Donnell testified that Coleman did not state during the phone call (or otherwise) that "until such time as Joseph told him he had no interest, he didn't care to discuss it with anyone," nor did he state that it was "Joseph's deal" (O'Donnell, R. 1781). Coleman's deposition, which appellant took but declined to introduce, would give an unprejudiced report of the conversation. Appellant saw fit, however, not to introduce it although invited by appellees to do so (R. 2001-2). Appellant testified that he never communicated with Coleman after

his telephone call of December 26, 1952 (Joseph, R. 531, 644, 497). If appellant had been told by Coleman that he considered Kinzua "Joseph's deal," why did Joseph not contact him when Allyn withdrew in April? Why did he ask Terman to find out the details of the appellee's purchase instead of himself calling Coleman for an explanation? The reason is clear.

4. Exhibit 404—appellant's 3-10-53 dilemma

On March 30, 1953, O'Donnell told Marshall, Allyn's Northwest representative, that he had received a very favorable report from a Mr. Price, a timber engineer, on the timber (O'Donnell, R. 1834-40; Marshall, R. 3354). O'Donnell likewise testified that on the day following he advised Joseph of the favorable Price timber report (O'Donnell, R. 1840-1, 1947-8). Yet Joseph testified at the trial that while O'Donnell called him in late March (at time of deposition, March 10th), he told him that he was then trying to get Price to go into the woods to *cruise* (at time of deposition, "look at") the timber (Joseph, R. 464-5, 608-11; Joseph Dep., R. 2506-7, 2532-3). Appellant would have this court believe that O'Donnell advised Allyn through Marshall (who admittedly was brought into the Kinzua picture by Joseph and with whom, insofar as O'Donnell then knew, Joseph was probably checking from time to time) that Price had been into the woods and that his timber report was favorable, and that on the next day he advised Joseph that he was still trying to get Price to go into the woods! That brings up Joseph's wierd testimony as to Exhibit 404, the memo bearing the date March 10, 1953.

Exhibit 57 is an undated phone call reminder which reported that O'Donnell had called from Seattle, setting forth O'Donnell's Seattle phone number and that of the Seattle operator. On the reverse side of this exhibit (Exhibit 404), are some handwritten notes of Joseph which are dated "3/10/53" and which recite:

"Conversation had with O'Donnell, returning his call had to do with him waiting for Price . . . to have him go down to Kinzua, and look over operations & timber and said he would contact me later."

At the time of his deposition, Joseph said he must have had a conversation with O'Donnell on 3/10/53, the date of the memo, but that he had no independent recollection of it other than this phone slip (Joseph Dep., R. 2506-7). He further testified that he recalled no conversation with O'Donnell after March 10th (Joseph Dep., R. 2520, 2561) and he was positive O'Donnell had not called him about March 30, 1953 (Joseph Dep., R. 2534-5). However, *at time of trial*, Joseph identified the phone call reminder (Exhibit 57) as a telephone message in the handwriting of his secretary, given to him the "last part of March" (Joseph, R. 468-9, 601). As to the reverse side of the exhibit (Exhibit 404), Joseph was *unable to explain why the "3/10/53" was on the exhibit since he now claimed he recalled the call was in late March*, nor was he able to give any reason for his abrupt change of testimony (Joseph, R. 600-08, 494-5).

It is pointed out that the date "3/10/53" is not a casual one; it is given in paragraph V of plaintiff's complaint and it was the subject of extensive inquiry in the discovery deposition. This exhibit is the basis for Joseph's excuse for his silence from March until late

August after the Kinzua purchase had been concluded. At the time of trial, *contrary to his deposition*, Joseph testified that after his "last part of March" conversation with O'Donnell, he saw no occasion to inquire as O'Donnell had told him Price was making a *cruise* which Joseph thought would take at least 90 days (Joseph, R. 464-7). Joseph was unable to recall when he first thought of this glib explanation (Joseph, R. 608-10). He admitted that Exhibit 404 said nothing about Price making a "cruise" (Joseph, R. 609-10). Joseph knew nothing about cruises—he admitted that he never offered to pay any part of what he thought might be a 90-day program involving an examination of every acre of the 110,000 acres involved (Joseph, R. 611-2). Further, it is noted that Terman's note dated April 23, 1953, crowded into his diary, makes no mention of any "cruise" (Exhibits 406 and 407). It merely quotes Joseph as telephoning two weeks earlier that O'Donnell was "working on deal with Mr. Price and A. C. Allynman" (Exhibit 407). Terman could recall nothing else (Terman, R. 1268-9).

As part of the Pre-Trial Order, defendants furnished to plaintiff's counsel a list of all exhibits which they intended to use. These included Exhibits 638, 639 and 647 indicating that O'Donnell was playing golf and was at the Racquet Club in Palm Springs on March 10, 1953, that he had not been in Seattle from January 20, 1953, until March 23, 1953, and that he could not have made or received a phone call in Seattle during that period of time. Appellant's counsel had this information approxi-

mately ten days before trial commenced. It is clear that Joseph changed his testimony with respect to his memorandum dated 3/10/53 (Exhibit 404) because he was informed that O'Donnell had absolute proof he was not in Seattle during the time mentioned. Yet Joseph denied that this was the reason but could supply no other (Joseph, R. 606-8).

Could it be, however, that another reason for Joseph's completely new trial version of his last contact with O'Donnell (before learning of Kinzua's purchase in August) was his realization that his story sorely needed basic strengthening? If he conceded that the date of the last telephone call from O'Donnell was substantially contemporaneous with that to Marshall, Allyn's representative, but he then claimed that O'Donnell's report on the status of Price's inspection was different from that given Marshall, a strong inference of duplicity would be raised. In addition, if Price's "look at the timber" were converted into a "cruise of the timber," an explanation, theretofore missing, of his failure to contact O'Donnell, Coleman or Terman and of Terman's failure to contact Joseph or Needleman or Gold for more than four months, would be supplied. Unfortunately for the appellant's case, however, he couldn't change his story without further discrediting both his testimony and his exhibits. And, he could not eliminate or change A. C. Allyn's testimony that he had reported to Joseph in the latter part of April, 1953, his dropping of the Kinzua matter.

Exhibit 404 and appellant's testimony with respect to it are *incredible and untenable*.

5. Appellant's file was "organized" long after the events occurred

Appellant's counsel, on page 44 of Appellant's Opening Brief, says: "Its [Exhibit 404] inadvertent misdating by Joseph is of transcendently slight importance." Considering

- (a) the equally queer date on Exhibits 386, 387, 388 and 389, dated 12-22-52 (making reference to the car of lumber purchased 12-26-52) ;
- (b) the obvious self-serving purpose of Exhibit 393 dated 12-29-52 (the handwritten memorandum reporting what Coleman allegedly told O'Donnell, *i.e.*, this was Joseph's deal) ;
- (c) Joseph's confusion with respect to Exhibits 381, 382 and 391 (his prospecti prepared to interest possible investors) ;
- (d) the notes on the back of the telephone call slip (Exhibit 343) which Joseph testified were made on 11-7-52 setting forth facts about Kinzua which he did not know until the November 19, 1952, Portland meeting ; and
- (e) the peculiarly dated memo of 3-10-53 (Exhibit 404)

the so-called "inadvertence" becomes a matter of more than idle speculation of "transcendently slight importance." *There is every indication that Joseph sometime long after the events occurred tried to organize his file.* Whether it was before he turned it over to Terman's attorney, Hoffman, in September, 1953 (Hoffman, R. 1127 ; Joseph Dep., R. 2291-2), or after Hoffman delivered it to appellant's attorney almost eighteen months later (Hoffman, R. 1120, 1143), is a matter of speculation. When and for what purpose such "organ-

ization'' was undertaken obviously has not and will not be explained by appellant.

VII.

O'Donnell Not Enriched by Reason of Allyn's Replacement by Webster

At page 13 of his brief, appellant states:

''While it is not certain, it is quite likely Joseph's loyalty to his duty to Terman was a main reason impelling O'Donnell to his desire to shake out Joseph as the provider of the other 50% of the financing.''

Later in appellant's brief this supposition is several times stated as established fact. Statements such as this point up the difficulty that appellant's attorneys have always had in trying to establish motivation or reason for O'Donnell's claimed ''shaking out'' of Joseph.

But the trial court found that O'Donnell inquired of Joseph after the November 19, 1952, Portland meeting with sellers' agents as to Terman's interest in Kinzua, and was told that Terman was simply a friend of Joseph and of the lawyer for one of Kinzua's stockholders, and that there was no need to worry about him. Joseph did not advise O'Donnell or Chinn, nor did Terman, that Terman was expecting any commission from Kinzua's purchasers or otherwise (O'Donnell, R. 1646-7; Chinn, R. 921-4).

O'Donnell did not, nor did any other of the so-called O'Donnell western group, acquire the interest in Kinzua or any part thereof or profit from such interest or any part thereof which Joseph claims he was entitled to buy or to raise—whatever the latter term covers (Ex-

hibit 114). O'Donnell took only 7% of the transaction and his family corporation 3% for a total investment in the down payment of \$334,500 (Exhibit 114). This is less than the interest which he first indicated he might possibly take in Kinzua (O'Donnell, R. 1948; Dunn, R. 1079). Capital Timber Products Company, Webster's company and the "last minute" replacement of Allyn, acquired 50% of the Kinzua purchase (Exhibit 114). As a result, the so-called O'Donnell western group secured less of Kinzua than they intended had Allyn participated as a purchaser (O'Donnell, R. 1552-3).

Since it is clear that O'Donnell did not benefit at Joseph's expense from the claimed "shake out" of Joseph, some other reason had to be urged by appellant. Hence it becomes stated as a fact that O'Donnell from the beginning had been trying to scheme up some way to "shake out" Joseph to avoid his 10% share of Terman's alleged claim to a 5% free ride, a claim which had never been communicated to O'Donnell, Chinn, Coleman or Allyn!

VIII.

If Any Relationship Ever Existed Between Appellant and O'Donnell With Reference to Kinzua, It Was Terminated by March 31, 1953

The trial court concluded from the facts which it found that if any relationship ever existed between Joseph and O'Donnell, it was terminated by March 31, 1953; that Joseph's conduct caused O'Donnell to believe that such relationship, if any, ceased to exist; and that Joseph is estopped to assert a contrary claim (Conclusion of Law VIII, R. 281, App. II, pp. 33-36).

Although appellant makes a broad general statement on page 7 of his brief that his appeal is based “... in large measure on the insufficiency of the facts to support the findings, and of the findings to support the judgment that there was no joint venture or *that it was terminated*, or that plaintiff was barred by laches,” nowhere in his brief does he argue that the Findings of Fact do not support Conclusion of Law VIII, nor that Conclusion of Law VIII is not alone sufficient to support the Judgment. Appellant’s only argument is that Finding of Fact IX(6) (R. 263-264)⁴³ is not supported by the evidence. His is the simple argument that the trial court erred in believing O’Donnell’s testimony rather than Joseph’s concerning the telephone conversation between them on March 31, 1953, but that if O’Donnell’s testimony were believed, the trial court erred in not construing it as appellant wishes (Appellant’s Brief, pp. 54-5).

In the first instance, then, appellant is simply asking

⁴³ Findings of Fact IX(6) annotated to supporting portions of the record is as follows:

“(6) On March 31, 1953 O’Donnell called Joseph in Chicago and told him that Price had made a favorable report with respect to Kinzua’s timber and that O’Donnell and others were going to go ahead and look the whole Kinzua deal over (R. 1840-1) and he again indicated that he, the three Wymans and Stuchell each might put a half million in the Kinzua purchase and others not yet talked to probably would make more available (R. 1948). Joseph reiterated that his interest was with the Allyn group and told O’Donnell to do his ‘business with Marshall’ (R. 1841, 1867-8, 1947-8). No arrangements were made during the conversation or subsequently for further discussions between Joseph and O’Donnell (R. 1841). O’Donnell had reason to believe and did believe that the only interest Joseph then or thereafter had with respect to Kinzua was with the Allyn group exclusively (R. 1867-8, 1882-3), and neither Joseph nor O’Donnell thereafter contacted or attempted to contact each other until after Kinzua’s sale to the defendants was completed” (R. 467-8; Pre-Trial Order, Admitted Fact XXIV, R. 159-60).

this Court to substitute its judgment of the credibility of two witnesses' testimony for that of the trial court. This the Court should refuse to do. Nevertheless, respondents welcome the opportunity to demonstrate the soundness of the trial court's determination of this matter.

What was the testimony of O'Donnell upon which Finding of Fact IX(6) is based? He was examined by appellant's counsel respecting the March 31, 1953, telephone conversation during pre-trial discovery (O'Donnell Deposition, R. 3590-2). Again, during the trial, appellant's counsel questioned O'Donnell closely on the matter (O'Donnell, R. 1840-1, 1867-8). Upon cross-examination, O'Donnell's counsel examined him yet again about the conversation (O'Donnell, R. 1947-8). O'Donnell consistently and repeatedly testified that after receiving Price's (a timber engineer) favorable report of his examination of Kinzua timber, O'Donnell called Joseph in Chicago, told him of the report, that he was going to investigate Kinzua further, that he and others in the Northwest could invest at least \$2,500,000 in a purchase of Kinzua, that he requested Joseph to confirm that his interest was with the Allyn group, and that Joseph answered that he was with the Allyn group and for O'Donnell to deal with Allyn's Northwest representative.

What was Joseph's testimony concerning the March 31, 1953, telephone conversation? He was closely questioned concerning this matter on three occasions. The first occasion was during pre-trial discovery (Joseph Deposition, R. 2506-12, 2519-20). During the trial his

counsel examined him with reference to it (Joseph, R. 464-5). Again, upon cross-examination, Joseph was asked to reconcile his deposition testimony of the conversation with that given on direct examination at the trial (Joseph, R. 601-8). Joseph's testimony at the trial was that his last contact with O'Donnell occurred on an unknown date in the latter part of March, 1953, by reason of a telephone call from O'Donnell wherein O'Donnell stated that he was trying to get a timber engineer named Price to make an inspection of the Kinzua property and arrange for a cruise. At his counsel's suggestion, Joseph further testified that O'Donnell stated he would let Joseph know when he got a report on the cruise (Joseph, R. 464-5).

This testimony *contradicted* his previous testimony given during pre-trial discovery. On that occasion, Joseph stated unequivocally and repeatedly that his last conversation with O'Donnell was a telephone conversation, initiated by O'Donnell from Seattle, which occurred on March 10, 1953 (Joseph Deposition, R. 2520). He further testified that he had no independent recollection of the conversation, that a memorandum (Exhibit 404) dated March 10, 1953, was his only basis for testifying that he had any conversation with O'Donnell in March, 1953, and that he remembered nothing which was said which was not stated in the memorandum (Joseph Deposition, R. 2507).

When confronted with this testimony upon cross-examination at the trial, Joseph offered no credible explanation of why he had changed his testimony. In fact, he denied the only apparent explanation which

is that he was informed by his attorney or otherwise, that he couldn't have talked to O'Donnell in Seattle on March 10, 1953, because O'Donnell was not in Seattle on that date (Joseph, R. 601-8). Joseph's denial that he had any recollection of discussing this fact with his attorneys (Joseph, R. 607-8), is *prima facie* unbelievable; it is more so when no other credible explanation of a change of critically important testimony is made.

Not only did Joseph himself impeach the credibility of his version of the March 31, 1953, telephone conversation, however, much other evidence corroborates O'Donnell's testimony of that conversation.

It is not disputed that Joseph introduced A. C. Allyn to the Kinzua situation on December 30, 1952 (Joseph, R. 554); nor that he requested O'Donnell to give to Allyn all of the information about Kinzua which he possessed; nor that O'Donnell complied with his request (Joseph, R. 453, 557-8); nor that Joseph indicated that he would follow through with Allyn to determine his interest in Kinzua (Joseph, R. 632-4, Exhibits 54 and 55). Neither is there any doubt that on March 30, 1953, O'Donnell called Allyn's Northwest representative and advised him that he had a favorable report upon Kinzua timber from Price (the timber engineer) and that he (O'Donnell) was going to investigate Kinzua further (O'Donnell, R. 1839-40; Marshall, R. 3354). O'Donnell's testimony is that he called Joseph on the following day, told him the same thing, and confirmed that Joseph's interest was with Allyn (O'Donnell, R. 1840-1, 1867-8, 1947-8). Joseph's revised trial testimony is that O'Donnell reported to him that he

was trying to arrange for Price to make an inspection of Kinzua (Joseph, R. 464-5).

It is inconceivable that O'Donnell would make a report to Allyn who was presumably Joseph's friend and associate of many years (Joseph, R. 447-8), and who was supposed to report his Kinzua investigation results to Joseph (Joseph, R. 450-1, 632-4; Exhibits 54 and 55; Allyn, R. 2881-2), and that on the following day, O'Donnell would make a purposeless telephone call to Joseph and tell him something completely inconsistent and contrary. If Joseph's revised testimony were to be believed, appellant's counsel could add the adjectives "naive" and "stupid" to their vituperative assault upon O'Donnell.

Even appellant concedes the incredulity of Joseph's revised testimony of the March 31, 1953, telephone call. However, he argues that "Even on O'Donnell's version of the call, the *necessity* for checking back with Joseph . . . is apparent" (Emphasis supplied) (Appellant's Brief p. 54).

Such "necessity" was not "apparent" to the trial court; nor is it to anyone who critically and objectively reviews all of the evidence. In particular, we respectfully direct attention to the following enumerated Findings of Fact (See Appendix II hereto), and to the portions of the record indicated:

<i>Findings of Fact</i>	<i>Documentation to Record</i>
VII (3) (4) (App. 32-33)	Joseph, R. 572-6, 589; Terman, R. 1364; Exhibit 423, R. 1358; and Exhibit 43.
VIII (1) (App. 33)	Joseph, R. 447-9.

*Findings of Fact**Documentation to Record*

VIII (6) (App. 34-35)	Joseph, R. 554-6; O'Donnell, R. 1810-11.
VIII (7), IX (2) (App. 35-36)	Joseph, R. 456, 657-9; Exhibit 52, R. 456; Exhibit 46, R. 657-9.
X (4) (App. 40)	Joseph, R. 496-7, 633-6, 644; Allyn, R. 2875-6.
XI (3) (App. 43-45)	Joseph, R. 468, 473; Exhibit 90, R. 473; Exhibit 93, R. 475.
XI (4) (App. 45-46)	Joseph, R. 652-4, 661, Exhibit 117.

It is most significant that, except for a possible telephone call on January 9, 1953, of which neither Joseph nor O'Donnell have any recollection or memoranda, Joseph did not initiate a contact with O'Donnell, Chinn, Coleman or Casey after he referred Kinzua to Allyn on December 30, 1952, until after Kinzua's purchase in August, 1953. It is likewise most significant that Allyn did not recall any further contact by Joseph after the initial conversation of December 30, 1952 (Allyn, R. 2879-80). Could it be that Joseph lost all interest in Kinzua following his receipt of the January 7, 1953, letter of the LaSalle National Bank which enclosed a banking publication's pessimistic forecast of economic "rough times ahead" in the lumber and plywood industry of the Northwest? (Exhibit 46). Even Joseph's substantially continuous contact with Terman respecting Kinzua virtually terminated following his receipt of Exhibit 46. Indeed, after he forwarded a copy of the sobering forecast to Terman on February 27, 1953 (Joseph, R. 633; Exhibit 122), Mr. Terman's interest also appears to have subsided (Terman, R. 1386-7).

On or shortly following April 27, 1953, Allyn called Joseph and told him that "we were getting out" of Kinzua (Allyn, R. 2875-6; Marshall, R. 3363, 3376-7). Joseph testified that he didn't recall Allyn so advising him, but that he may have done so (Joseph, R. 634). Is it conceivable that anyone with a continuing 50% interest in a multi-million dollar purchase would not recall such a significant and crucial contact? Or, does appellant's counsel suggest that Allyn's testimony is untruthful, too?

Joseph informed no one of Allyn's withdrawal of interest in the purchase of Kinzua. Not O'Donnell or Chinn (Joseph, R. 496-8, 633-6, 644); not Coleman or Casey (Joseph, R. 497-8); not even Terman (Terman, R. 1386-7). If any relationship such as Joseph claims existed between him and O'Donnell on April 27, 1953, would he not have had the obligation and duty to advise O'Donnell of the withdrawal of the only potential investor he had ever disclosed to O'Donnell? Why did he not inform Terman?

It is likewise significant that after Joseph learned of Kinzua's purchase by the respondents, he contacted O'Donnell on only one occasion. That was by letter dated August 31, 1953, four days after he learned of the purchase, in which he stated he "would appreciate your letting me know a little more about it" (Exhibit 90, Joseph, R. 473). O'Donnell replied by letter dated September 22, 1953 (Exhibit 93, Joseph, R. 475). Joseph never answered O'Donnell's letter (Joseph, R. 640) and made no claim of interest in Kinzua until some 20 months later (Exhibit 117, Joseph, R. 652, 654).

These communications and conduct were not those of a person who considered himself to have been wrongfully deprived of a right to 50% of a \$12,000,000 purchase.

The substantial evidence in the trial record overwhelmingly supports and confirms Finding of Fact IX (6) of the trial court. It should not be disturbed. Fed. Rules Civ. Proc., Rule 52(a), 28 U.S.C.A. The trial court's Conclusion of Law VIII is likewise adequately supported by that and the other findings of fact above cited.

IX.

Joseph's Claim Is Barred by Speculative Delay and Laches

Appellant, again without attempting to support his position with factual or legal analysis, asserts that the trial court's findings and conclusion of speculative delay and laches are "inappropriate" and "must be swept aside along with the other findings denying the existence of the fiduciary relationship and joint venture and its binding character" (Appellant's Opening Brief, p. 84).

The mandate of Federal Rule 52(a) is that the trial court's findings of fact "shall not be set aside unless clearly erroneous." Fed. Rules Civ. Proc., Rule 52(a), 28 U.S.C.A., 1950 ed. Appellant is apparently familiar with this rule inasmuch as one of his headnotes on p. 84 of his opening brief states that "On the Record on These Issues Which Is Before the Court, the Findings as to Laches, Estoppel, and Speculative Delay Are

Clearly Erroneous.” But, he does not thereafter cite a single finding which is not abundantly supported by the trial record!

We respectfully direct the Court’s attention to the findings of the trial court, which support its conclusion that appellant is estopped by his speculative delay and barred by his laches to now assert a claim against respondents:

- (1) Appellant learned of Kinzua’s purchase by respondents on August 27, 1953, ten days following the execution of the purchase documents (Finding of Fact XI(1) and (3), R. 268, App. II, p. 43).
- (2) Appellant knew on August 27, 1953, and earlier, that participation in the purchase of Kinzua was highly speculative and fraught with risk (Finding of Fact XIV, R. 275-277, App. II, pp. 50-52).
- (3) Appellant knew on August 27, 1953, and earlier, that if Kinzua’s purchase price of \$12,000,000 was to be economically feasible, substantial changes in corporate structure and organization and in management, operation and production were mandatory, and would require many months to complete, pending which participation in the purchase would be particularly hazardous (Finding of Fact XIV, R. 275-277, App. II, pp. 50-52).
- (4) The changes which appellant knew on August 27, 1953, were necessary were, in fact, undertaken and, over a period of many months, completed (Finding of Fact XV, R. 277-279, App. II, pp. 52-55).
- (5) Appellant had received an extremely pessimistic report from his Chicago bank in January, 1953, concerning economic prospects of the lumber and plywood business of the Pacific Northwest and

appellant knew that the prices of timber stumpage and lumber products were declining in the winter, spring and summer of 1953 and that the lumber industry was in a depressed condition (Findings of Fact VIII (7), R. 261, App. II, pp. 35-36; XIII (7), R. 275, App. II, p. 50; XVI, R. 279-280, App. II, p. 55).

- (6) Appellant knew that prices of timber stumpage and lumber products had materially increased during 1954 and 1955, and he believed in May, 1955, that the Kinzua investment had been highly successful (Finding of Fact XVI, R. 279-280, App. II, p. 55).
- (7) Appellant learned of the names of all of the purchasers of Kinzua on or before August 27, 1953, but did not make any demand upon any of them, nor suggest that he had a claim, until May, 1955, more than twenty months later (Findings of Fact XI (3) and (4), R. 268, 270, App. II, pp. 43-46).
- (8) Appellant's only communication with O'Donnell after he learned of Kinzua's purchase was a letter dated August 31, 1953, which contained no hint of a claim or demand (Finding of Fact XI (3), R. 268-269, App. II, pp. 43-45). Appellant did not reply to O'Donnell's September 22, 1953, response to said letter (Finding of Fact XI (4), R. 270, App. II, pp. 45-46).

Each of these findings is set forth in Appendix II hereto, and each is documented in detail by references to specific evidence in the trial record. The trial court concluded from these findings that the plaintiff had been guilty of speculative delay and laches.⁴⁴

⁴⁴ Conclusion of Law IX, R. 282: "IX. Plaintiff speculatively delayed asserting any claim against defendant O'Donnell or any of the other defendants during the period of the greatest hazard to defendants' invest-

The doctrine of laches as applied in the state courts of the State of Washington is the law to be applied in this case (By Stipulation, Preamble to Findings of Fact and Conclusions of Law, R. 245).

The doctrine of laches followed in the State of Washington is in accord with that developed by federal courts of equity. In *Ferrell v. Lord*, 1906, 43 Wash. 667, 86 Pac. 1060, the court stated at 1062:

“There is no inflexible rule controlling the application of the defense of laches. The facts and circumstances of each case must govern courts of equity in permitting said defense to be made. The authorities show that, while lapse of time is one of the elements to be considered in applying this equitable defense to stale claims, it is only one, and that it is not necessarily the controlling or most important one. Regard must be had to all the facts and surrounding circumstances. . . .”

The court thereafter quoted with approval from the United States Supreme Court opinions of *Hayward v. National Bank*, 1878, 96 U.S. 611, 617, 618, 24 L.ed. 855; *Townsend v. Vanderwerker*, 1895, 160 U.S. 171, 186, 40 L.ed. 383, and *Patterson v. Hewitt*, 1904, 195 U.S. 309, 49 L.ed. 214, wherein the broad general principles of the doctrine of laches are discussed.

See also: *Edison Oyster Company v. Pioneer Oyster Company et al.*, 1945, 22 Wn.2d 616, 628, 157 P.2d 302.

The tests which the courts of the State of Washington apply in determining the existence or non-exist-

ment and until the success thereof appeared to him to be certain. Plaintiff is barred by laches and he is estopped from asserting any claim against defendant O'Donnell or any other defendant.”

ence of laches, no one of which is controlling, are the following:

A. Lapse of Time

The Supreme Court of the State of Washington, in *Ferrell v. Lord*, 1906, 43 Wash. 667, 86 Pac. 1060, quotes with approval from *Townsend v. Vanderwerker*, 1895, 160 U.S. 171, 186, 40 L.ed. 383, as follows at 1063:

“The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.”

Also quoted at length in *Ferrell v. Lord*, *supra*, is the United States Supreme Court case of *Patterson v. Hewitt*, 1904, 195 U.S. 309, 49 L.ed. 214. In the last-cited case, Mr. Justice Brown, in a portion of his opinion which is not quoted by the Washington court, states at p. 319:

“Indeed, in some cases the diligence required is measured by months rather than by years.”

In *Bacon v. Neill*, 9 Cir. 1922, 283 Fed. 717 (on appeal from the United States District Court for the Eastern District of Washington) the defendant acquired the property with respect to which the plaintiff claimed a right and interest in March, 1917. Plaintiff, some two years and nine months later, commenced his action to establish such rights. Despite the fact that the time prescribed by the analogous statute of limitation barring an action at law had not expired, the

court found that plaintiff had delayed too long in asserting his rights and that relief in equity was barred by his laches.

The Supreme Court of Washington, in *Stewart et al. v. Johnston et al.*, 1948, 30 Wn.2d 925, 195 P.2d 119, discussing lapse of time as an element of laches, adopts the following language at p. 125:

“ ‘A court of equity moves upon consideration of conscience, good faith and reasonable diligence. Knowledge and unreasonable delay are essential elements of the defense of laches. The precise time that may elapse between the act complained of as wrongful and the bringing of suit to prevent or correct the wrong does not, in itself, determine the question of laches. What constitutes unreasonable delay is a question of fact dependent largely upon the particular circumstances. No rigid rule has ever been laid down. Change of position on the the part of those affected by nonaction, and the intervention of rights are factors of supreme importance. . . .’ *Federal United Corp v. Havender*, 17 Del. App. Ch. 318, 435, 11 A.2d 331, 343.

“In the case last quoted, there is an enumeration of instances in which delays of from one to ten months have been held to constitute laches.”

B. Nature of the Subject Matter and Its Propensity Toward Fluctuation in Value

It is well established that a court of equity will not countenance speculative delay; it will not permit the claimant to lie back and wait to see whether the venture is to be profitable before asserting his claim. This is particularly true where the nature of the property is such that fluctuation of value is likely. In the widely

cited case of *Twin-Lick Oil Co. v. Marbury*, 1875, 91 U.S. 587, 23 L.ed. 328, Mr. Justice Miller stated (pp. 592-593):

“No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed in a court of equity.

.

“The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.

“While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of any thing known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.”

Cf. *Curtis et al. v. Lakin et al.*, 8 Cir. 1899, 94 Fed. 251; *Taylor v. Salt Creek Consolidated Oil Company et al.*, 8 Cir. 1922, 285 Fed. 532.

The doctrine of speculative delay was approved and followed in the case of *Robinson v. Linfield College*, E.D. Wash. 1941, 42 F.Supp. 147, aff'd. 136 F.2d 805.

C. Change of Position by Appellees

Courts of equity will not grant their extraordinary relief to one who has delayed assertion of his claim, especially where the delay has led to a change of conditions or the other party has innocently altered his position with respect to the subject matter. Cf. *Hays v. Port of Seattle, et al.*, 1920, 251 U.S. 233, 64 L.ed. 243; *Lavigne v. Hughes*, 1939, 199 Wash. 285, 91 P.2d 560; *Chezum v. McBride et al.*, 1899, 21 Wash. 558, 58 Pac. 1067.

In view of the facts of the instant case, the language of the California court in the case of *Livermore v. Beal*, 1937, 18 Cal. App.2d 535, 64 P.2d 987, at page 995, is peculiarly applicable:

“Or, in other words, one is not permitted to stand by while another develops property in which he claims an interest, and then, if the property proves valuable, assert a claim thereto, and, if it does not prove valuable, be willing that the losses incurred in the exploration be borne by the opposite party. This thought was expressed in one case by the following language: ‘If the property proves good, I want it; if it is valueless, you keep it’.”

A similar statement of the applicable rule appears in *Wright et al. v. Tacoma Gas & Electric Light Co. et al.*, 1909, 53 Wash. 262, 265, 101 Pac. 865, where it was said:

“This action was brought on December 13, 1906, six months after the action complained of. It is

the law of this state that the statute of limitations cannot be relied upon in a case of this kind, but that parties who are seeking equitable relief must proceed within a reasonable time. It is also established by the law generally that the right of a dissenting stockholder may be lost by laches. 2 Cook, Stockholders (3d ed.) par. 733. It is also stated, in the same authority:

“ ‘If it is evident that the stockholder is waiting to see whether the unauthorized act would be profitable to the corporation, the court will refuse to grant him any relief. So, also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed or money expended or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred’.”

Expenditures and improvements by defendants constitute a sufficient change of position to warrant the application of the doctrine of laches. *Chezum v. McBride*, 1899, 21 Wash. 285, 58 Pac. 1067. The rule is stated in 19 Am. Jur., Equity, §512, pp. 355-356, as follows:

“Proof of this factor consists frequently in evidence showing the expenditure of money or the incurring of obligations by the defendant in the belief that he had a clear or unencumbered right. The bill will be dismissed where it appears that the complainant stood by and permitted the defendant to expend sums of money in improving the property.”

D. Apparent Acquiescence by Appellant

De Boe v. Prentice Packing & Storage Co., 1933, 172 Wash. 514, 20 P.2d 1107, contains a comprehensive analysis by the Washington court of what constitutes

acquiescence. The court there approves the general rule regarding this factor, stating at page 1110:

“ ‘The term “acquiescence” is sometimes used improperly. It differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. . . . As acquiescence is thus a recognition of and consent to the contract or other transaction as existing, the requisites to its being effective as a bar are, knowledge or notice of the transaction itself, knowledge of the party’s own rights, absence of all undue influence or restraint, and consequent freedom of action; . . . When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity.’ 2 Pomeroy’s Equity Jurisprudence, §965.”

Applying these tests to the facts of this case, and, in particular, to those above outlined, the correctness

of the trial court's Conclusion of Law IX is clear. That appellant recognizes this is attested by his abortive attempt to shift the responsibility for his long delay to his friend and associate Sol A. Hoffman (Joseph, R. 480-1; Appellant's Opening Brief p. 85). Mr. Hoffman, however, repudiated appellant's efforts; although he acknowledged that appellant's file on Kinzua was in his possession from September, 1953, until the early months of 1955, he stated that it was referred to him as attorney for Mr. Terman, and that he had not represented appellant as his attorney in this matter (Hoffman, R. 1141-44). Thus, appellant's delay in asserting his claim was not due to a lawyer's procrastination, as argued, but to the speculative delay which the trial court found.

We concur in appellant's statement that the elements of laches, estoppel and speculative delay must be proved and are not presumed to exist. We submit such proof is manifest in the trial record.

X.

Credibility—A Comparison of Appellant and O'Donnell

A. Appellant's Attorney Continued to Scurrilously Vilify and Abuse O'Donnell

Appellant, in his opening brief continues, as before the trial judge, to vilify and abuse O'Donnell.

Although appellees do not intend to wallow in appellant's trough, they feel that designed scurrilous mudslinging at integrity and character should not go uncalled, and should be identified as such. With unwritten appropriate adjectives interpolated and falling in place as they may and with endeavored restraint, appellees

have heretofore and do hereafter discuss a number of phases of the evidence bearing on relative credibility. To discuss all of the many, many phases of Joseph's and Terman's evidence casting doubt upon their over-all credibility is not possible within reasonable space limitations.

The trial judge, who observed Joseph as a witness during 4 days of testimony, O'Donnell as a witness for a like period, and Terman for 2 days, and who considered this matter over a period of months, could best judge the credibility of these parties. In his oral decision, he said in part,

"I cannot subscribe to the castigation of Mr. O'Donnell's character and of his testimony that counsel for the plaintiff have given in their briefs and argument, . . . I just can['t] agree with their view, and I don't agre[e] with it. I must say that Mr. O'Donnell impressed me most favorably." (R. 4249; Emphasis supplied)

And later, with respect to Joseph's claim of an agreement made on November 18, 1952, with O'Donnell in Portland, the court said:

" . . . I don't believe it . . . " (R. 4257; Emphasis supplied)

and with respect to conduct giving rise to the implication of a legally binding contract for a joint purchase of Kinzua,

"I have looked the evidence over from stem to stern and I can't find it." (R. 4257)

and further with respect to Joseph's claim of a joint venture,

“*I simply cannot believe and accept the [Joseph’s] story.*” (R. 4259; Emphasis supplied)

and,

“If you add to that five months’ silence and inaction the next following circumstance, astonishment and incredulity increase.” (R. 4260)

Commenting upon Joseph’s silence and inaction before the purchase by O’Donnell and others and his 20-month delay in asserting any claim after learning of the purchase, the trial court said:

“Either circumstance standing alone would throw the gravest doubt on Joseph’s claim of joint venture; the two together make *the claim incredible and untenable.*” (R. 4261; Emphasis supplied)

1. Nature of appellant’s abortive attack on O’Donnell

Thwarted as they are in establishing a contract of joint venture between Joseph and O’Donnell, appellant’s counsel attempt to establish a case by villifying O’Donnell. It is too obvious to require comment that appellant cannot sustain the burden of proof by calling another a liar. But even in villifying O’Donnell, counsel grasp at straws that do not exist. By drawing their own false inferences from O’Donnell’s testimony, they create their own straw men to destroy. Then, after destroying their own inferences, they confusedly urge that they have destroyed the testimony which they themselves falsely interpreted. But, of course, they do no more than to destroy their own creature. The testimony as given stands unimpeached.

For example, on page 69 of their brief, counsel say in effect that O’Donnell dishonestly quibbles by testifying that he did not tell Joseph that Kinzua’s timber would

sell for \$40 per M, but only that it would *appraise* at that figure. Counsel then infer, that:

“(Clearly, O’Donnell at trial wanted to make it seem that the profit would be small, and that he had given Joseph little information which in any case Joseph misinterpreted).”

This is counsel’s own inference—certainly not O’Donnell’s. And it is an oblique way of saying that in counsel’s opinion O’Donnell was dishonest.

O’Donnell’s testimony, however, is clearly understandable. He contemplated a situation where Kinzua’s timber would be owned by individuals who in turn would sell to a sawmill corporation which the individuals themselves controlled. To establish for tax purposes the fairness of the controlled sale would require an independent appraisal of the timber. O’Donnell knew this, but probably Joseph and Kelleher did not. Hence, O’Donnell naturally thought in terms of appraisal; while Joseph and Kelleher probably thought in terms of sale. In this situation the same words could easily be interpreted differently by different persons depending upon their point of view. But despite the difference in interpretation the substance is the same; for the appraised value and sale value should be substantially equal. And since the entire matter is so remote from the actual issues involved in this case, it is mere trivia. Certainly it is an insufficient basis upon which to call O’Donnell a liar.

Again on page 69 of their brief, counsel infer that O’Donnell was dishonest when he testified (O’Donnell, R. 1920) that appellees “put up” \$800,000 for improve-

ments to the Kinzua properties. There is no doubt the moneys were expended—but they were expended from funds which were acquired directly or indirectly from Kinzua's purchase (R. 1933-4). Because they were expended from this source rather than from advances from other sources, counsel imply that O'Donnell was dishonest and that "pressure of documentation drove O'Donnell grudgingly and reluctantly toward the truth" (Appellant's Opening Brief, p. 70). Here again, counsel build their own straw man to destroy. They *infer* O'Donnell testified that the funds came from other sources. He did not. He testified the funds came from "an account that all of the individual owners [appellees] maintained to service the loan" (O'Donnell, R. 1920). It is counsel's *inference* that the funds came from other sources, and it is their own inference they destroy—not O'Donnell's. Proving inferences falsely drawn from testimony to be false does not prove either that the testimony is false or the witness a liar. It proves only that the inference falsely drawn is false.

Appellant's counsel discuss O'Donnell's relationship with Kelleher. What that has to do with establishing a joint venture between Joseph and O'Donnell certainly is not clear. But apparently counsel assume that O'Donnell wrongfully deprived Kelleher of a commission or fee, and then infer that because he did so, he "shook Joseph out" of the Kinzua deal to avoid paying Terman a finder's or broker's fee. Not only is the analogy between Kelleher and Terman unclear, but documentary evidence demonstrates that O'Donnell did not wrongfully deprive Kelleher of a fee (Exhibits 71, 74, 100 and 101).

A brief statement of the facts concerning the Kelleher incident should dispel the inferences which appellant seeks to draw from it. O'Donnell was aware of the fact that Kelleher was employed by Webster to find business transactions for him. When O'Donnell resolved to contact Webster following Allyn's drop-out on April 27, 1952, he called Kelleher for this purpose. Kelleher sought information from O'Donnell which he thereafter presented to Webster. Kelleher first informed O'Donnell by wire on May 18, 1953, that he claimed a commission in the Kinzua matter (Exhibit 71). On the following day, May 19, 1953, O'Donnell wired Kelleher that he didn't realize Kelleher "claimed to have any position other than as agent" for Webster, and that he (O'Donnell) would not recognize Kelleher's claim (Exhibit 74). Webster eventually settled Kelleher's claim in connection with Kinzua together with many others, all as set forth in Exhibits 100 and 101. O'Donnell had nothing to do with this settlement and did not contribute to it (O'Donnell, R. 1543-5).

B. Order in Which Depositions Were Taken

O'Donnell's and Chinn's depositions covering matters that occurred more than two years before the time Joseph apprised them of any claimed position with respect to Kinzua, were each taken in late September, 1955, several weeks before that of Joseph. Chinn's deposition was interrupted in the course of appellant's examination and was not completed. O'Donnell's deposition also was continued and appellees' counsel had no opportunity to question either O'Donnell or Chinn to straighten out any matters or to refresh their recollection (Chinn

dep., R. 3213, *et seq.*; O'Donnell Dep., R. 3386, *et seq.*). O'Donnell and Chinn submitted corrections to their depositions almost a year after the depositions were taken and when other testimony and evidence was available for the purpose of refreshing recollections.

As contrasted with the above, appellant admitted at the time of his deposition that he had seen O'Donnell's and Chinn's depositions (Joseph Dep., R. 2238-9), and that Terman had also made available to him his voluminous notes (Joseph Dep., R. 2288-91). Typically, on pages 175-7 of his deposition appellant admitted that his recollection wasn't very good and he was relying upon Terman's notes (Joseph Dep., R. 2288-90). Terman came all the way back to Chicago just before Joseph's deposition, bringing his voluminous notes and spent several days there with Mr. Todd, one of appellant's attorneys, and appellant preparing for appellant's testimony (Joseph Dep., R. 2290-1). Appellant also had available for the purpose of refreshing his recollection his own file (Joseph Dep., R. 2291). Appellant's deposition was completed in the sense that it was continued only for a very limited purpose (Joseph Dep., R. 2638), and his counsel asked him questions and clarified matters (Joseph Dep., R. 2606-24, 2635-6). Appellant changed his testimony many times on crucial matters at the forcing and suggestion of appellees' attorneys examining him. He corrected his deposition within a short time after it was taken. Nevertheless, as pointed out repeatedly herein, his testimony at the trial on crucial matters varied materially from his deposition.

C. Appellant's Testimony Did But O'Donnell's Did Not Vary in Important Aspects from His Deposition

O'Donnell's and Chinn's testimony at trial was substantially the same in all material respects as at the time of deposition. The only changes made by O'Donnell or Chinn of any moment were changes occasioned (a) by the fact that after being shown a carbon copy of the letter in Joseph's file directed to O'Donnell at Palm Springs in February, 1953, O'Donnell recalled seeing the enclosure referred to in that letter (an excerpt from a banker's report of the depressed conditions in the lumber market) and he ascertained that he had made the phone call from Los Angeles to Chicago referred to in Joseph's letter, and (b) after his deposition, O'Donnell recalled being in the University Club of Portland on one occasion with Joseph which must have been November 18, 1952, the only evening that he saw Joseph, and he had a vague recollection of seeing Joseph in the hotel lobby when he arrived in Portland (O'Donnell, R. 1620-4).

O'Donnell and Chinn each testified that he had been in Portland many times, and at the University Club in Portland many times, contrasted with the fact that this was the first visit of Joseph to Portland. This explains certainly in part why O'Donnell did not remember the exact time and place of first seeing Joseph in Portland. It does not follow that O'Donnell and Chinn would not have recalled the occurrence of any important conversation.

Appellant himself was certainly at least confused on the time sequence (Exhibit 97). On June 23, 1954, ap-

pellant wrote to Lee Olwell, a Seattle attorney investigating the possibility of a claim by Terman for a broker's commission,⁴⁵ stating that "After the meeting" (with Coleman and Casey on November 19) he walked with Chinn and O'Donnell to Chinn's Club (the University Club) during which Terman's commission was allegedly discussed (Exhibit 97). Prior to the time of the taking of his deposition appellant knew (a) that the registrations at the Heathman Hotel in Portland showed that O'Donnell checked out about noon on November 19th and also gave the arrival times and the room numbers for Joseph, O'Donnell and Chinn (Joseph Dep., R. 2306-7), and (b) that O'Donnell and Chinn placed all relevant conversation after the meeting with Coleman and Casey (Joseph Dep., R. 2238-9). Without this information, it is submitted that appellant would have testified in accordance with his letter to Olwell (Exhibit 97), his only prior written record of recollection. Appellees wonder just what appellant's testimony as to the time sequence of his alleged agreement with O'Donnell would have been had his deposition been taken first, or had O'Donnell and Chinn remembered meeting Joseph the evening of November 18, 1952.

If appellant had corrected his deposition to conform to his testimony at trial, there would have been little of the important elements of his original testimony left, and this in spite of appellant's great advantage over O'Donnell and Chinn at the time of the taking of his deposition!

⁴⁵ Incidentally, but perhaps not insignificantly, Joseph's eventual choice of Seattle lawyers are also listed as possibilities for Terman (Exhibit 551)—Was Terman's claim also presented to them in the first instance?

D. Illustrations of the Many Variances in Appellant's Testimony

It would unduly extend this phase of the brief to point up all of the many discrepancies evident between appellant's deposition and his trial testimony. Many of these discrepancies have heretofore been mentioned, such as

1. The strange metamorphosis in appellant's testimony concerning the document prepared in mid-December to interest investors (Exhibits 381, 382 and 391). As mentioned at pages 105 to 109 hereof, it first appears that appellant thought these were notes he had in his possession before he met with Coleman, Casey, O'Donnell and Chinn in Portland on November 19th. Then he thought they were the notes of the meeting of November 19th. Only after many questions pointing it up, did he finally come to the conclusion that they were prepared in December to interest investors, and that the information in large part came from O'Donnell. Even then he had the time sequence mixed up in that he thought the first one was the one not making any reference to a Western group and the timber being examined, and that the one making such reference was the second. Later, after being further educated, he switched the time sequence around.
2. Appellant's shifting testimony with respect to the required down payment at the November 19, 1952, Portland meeting is set forth at pages 109 to 110 hereof.
3. Appellant's four versions in his testimony of his "if it looks good to ourselves," "take 50%," or "raise half the money," story is hereafter outlined at pages 152 to 162 hereof.
4. Appellant's testimony concerning his strangely

dated December 22, 1952, memo (Exhibits 386, 387, 388 and 389), the one in which he refers as an accomplished fact to the ordering of a car of lumber which was not ordered until four days later, is set forth at pages 110 to 112 hereof. It was this memo that he first testified he wrote out in longhand because his secretary was not good at dictation, that she then typed it, and he destroyed the notes. At trial, however, he was positive he had dictated it to his secretary directly and that there were no notes.

5. At pages 114 to 117 hereof, we have commented upon the remarkable alterations in appellant's testimony concerning Exhibit 404 (the alleged memo of a March telephone conversation with O'Donnell), including appellant's newly-discovered "cruise" story and his testimony that the conversation reported under the date of 3-10-53 was in late March rather than March 10th, just because "it suddenly came to him."

A few more of the adjustments in appellant's testimony between the time of deposition and trial are reflected in the following:

6. Appellant at the time of his deposition testified positively that he told Allyn about O'Donnell, but he was not certain that he told him about Munger (Joseph Dep., R. 2471-2). At the time of trial he was positive he had told him of Munger, but not positive about O'Donnell (Joseph, R. 623). The variance was unquestionably due to Allyn's testimony given subsequent to appellant's deposition that O'Donnell positively was not mentioned by appellant, but that Munger was (Allyn, R. 2873, 2877).
7. At the time of trial, appellant testified that on November 18, 1952, he told O'Donnell that he, appellant, "was told that this was to be kept confidential"

(Joseph, R. 373). At the time of deposition, he testified to the contrary that he did not tell O'Donnell that the information was confidential (Joseph Dep., R. 2597).

8. At the time of trial, appellant testified that O'Donnell assented to the joint venture proposal which he claims he made to O'Donnell on November 18, 1952 (Joseph, R. 594-5). He did not so testify in his deposition (Joseph Dep., R. 2311-12).

We have heretofore commented upon the memo-making capacities of witness Terman and his direct interest in the lawsuit at pages 69 to 73 hereof.

E. Appellant's Unwillingness to Introduce Coleman's Deposition

Appellant took the depositions of Coleman and Casey, the two Kinzua selling agents with whom Joseph, O'Donnell, Chinn and Allyn's representative Marshall had their dealings, and said depositions lay in the Clerk's office during the trial of this case. However, even though at the close of appellant's case before the trial court, counsel for O'Donnell called appellant's counsel's attention to the fact that the deposition of Coleman had not been introduced, appellant's counsel declined to introduce Coleman's deposition and objected to plaintiff's offer to do so (R. 2001-2). The inference to be drawn is clear.⁴⁶ Among matters Coleman could shed light on are: Coleman was a fellow director of Kinzua with Terman's friends Needleman and Gold;

⁴⁶ 20 Am. Jur., Evidence, §183, p. 188, §187, p. 192; *Coyle Lines, Inc., v. U. S.*, 5 Cir. 1952, 195 F.2d 737; *Interstate Circuit, Inc., v. U. S.*, 1938, 306 U.S. 208, 59 S.Ct. 467, 83 L.ed. 610; *Bengston v. Shain*, 1953, 42 Wn.(2d) 404, 255 P.2d 892.

Coleman was present at the meeting of November 19, 1952, when Joseph indicated only a small possible investment; Coleman was quoted by Joseph as saying that this was Joseph's deal, refusing to grant O'Donnell permission to interest others when he lost interest; Coleman would be aware of whether the car of lumber purchased by appellant was ordered on December 19, 1952, as appellant's December 22, 1952, memo states (Exhibit 387), or on December 26, 1952, as the evidence otherwise shows. Coleman was the leading agent engaged in selling Kinzua, yet appellant did not see fit to introduce his deposition, or that of Casey, Coleman's attorney. That both witnesses would testify adversely to appellant on material issues is to be inferred.

F. Appellant Can't Add—Three 50%^s Equal 150% of a Deal

The specious nature of Joseph's claim is pointed up by Joseph and his own counsel. Joseph claims he and a Chicago group of investors intended to invest 50% of Kinzua's purchase price, although he testified that he did not so advise O'Donnell (Joseph, R. 555-6). When O'Donnell withdrew on December 19, 1952, Joseph contacted A. C. Allyn, an investment banking firm in Chicago, on December 30th (Joseph, R. 448; Allyn, R. 2871). Joseph's counsel say, on pages 15 and 16 of their brief, that the purpose of the call to Allyn was to obtain a substitute for O'Donnell's 50% interest. But Joseph did not so advise Allyn, nor did Joseph tell him that Joseph and others had "committed" themselves for \$3,100,000 for Kinzua's purchase (Joseph, R. 551; Allyn,

R. 2877-8). Allyn thought Joseph was a curbstome broker seeking a finder's fee (Allyn, R. 2879).

On January 5, 1952, when O'Donnell became somewhat reinterested, O'Donnell told Joseph that he and other Seattle people could raise \$2,500,000 of Kinzua's purchase if subsequent investigation proved its desirability (O'Donnell, R. 1810-11). Joseph told O'Donnell to cooperate with Allyn (Joseph, R. 451-2), but did not tell him that Joseph and others had raised \$3,100,000. If then Joseph was to take 50% of Kinzua's purchase, and Allyn was to take 50% and O'Donnell was to take 50%, there were too many per cents by 50%, *plus* whatever Joseph believed Terman's percentage was to be.

It is not too much to expect that if Joseph was a joint venturer with O'Donnell he would have advised O'Donnell that he had raised \$3,100,000 if in fact it had been raised. Contrariwise, if the money was raised, his withholding that information is an indication that he did not consider that he and O'Donnell were joint adventurers. In any event, Joseph was the only one of the three, *i.e.*, himself, Allyn and O'Donnell, who knew Joseph had raised \$3,100,000, if it was raised. Fair dealing would require Joseph to clarify to Allyn and O'Donnell the strange story of 150% of a 100% deal. From his failure to do so, it is to be inferred either (1) that he was duplicitous or (2) that he considered himself unbound by a joint venture relationship with O'Donnell, or any other. The explanation of this strange state of affairs clearly rests with Joseph, not only because he has the burden of proof, but because the situation, if it

existed, was of his own creation. Our own explanation is that appellant's counsel is caught in the web of proving that which is simply nonexistent.

XI

Even Under Appellant's Version of the Facts, No Contract of Joint Venture Existed Between Him and O'Donnell

A. Counsel's Claimed Contract Is Based Upon False Assumptions and Specious Inferences Drawn Therefrom

In making its findings of fact the trial court found that O'Donnell was a completely trustworthy witness; and the record, objectively read, fully supports the trial court's finding. In this portion of the brief, however, we assume, *arguendo*, the truth of Joseph's version of the events occurring during their November 18 and 19, 1952, meetings in Portland and subsequently. *Even under his version of the facts no contract of joint venture was created between himself and O'Donnell.*

On page 12 of appellant's opening brief, his counsel say:

"They agreed specifically and affirmatively that Joseph and O'Donnell, for themselves and groups headed by each of them in Chicago and Seattle respectively, should, as equal joint venturers negotiate for and consummate the purchase of Kinzua on whatever suitable purchase basis could be arranged."

There is not one single shred of testimony, even of Joseph's, demonstrating that Joseph and O'Donnell agreed "specifically and affirmatively" to anything. The foregoing statement is at the very most a *conclusion of counsel* based upon their own assumptions and

inferences. This they themselves virtually recognize. For on page 27 of their opening brief, they say:

“The *assumption* would be far-fetched that two experienced businessmen such as Joseph and O’Donnell would go to an important meeting, flying hundreds of miles to do so, and start negotiations with the authorized representative of the sellers for purchase of a timber empire, without first having arrived at some understanding as to their relations as between themselves.” (Emphasis supplied.)

And again on page 29 of their brief, they say:

“That there was conversation that evening is plain. That it *must* have borne a relationship to the only reason they came to Portland—to enter into negotiations for the purchase of Kinzua—is also plain. The denial of Chinn and O’Donnell is inherently incredible.” (Emphasis supplied.)

That this is piling assumption upon assumption and inference upon inference is easily demonstrated:

1. From the fact that Joseph and O’Donnell flew “hundreds of miles” to Portland, counsel *infer* that they must have intended to enter into negotiations for Kinzua’s purchase;
2. *Assuming* then as fact that the parties came to Portland “to negotiate,” counsel *infer* that they must have discussed their relationship with each other as purchasers;
3. *Assuming* then as fact that they discussed their relationship, counsel *infer* that they must have reached an agreement with respect thereto; and
4. *Assuming* then as fact that they reached an agreement, counsel *infer* the agreement was that above set forth.

The foregoing assumptions are false. Joseph did not fly from Chicago to the West Coast solely to attend, as counsel imply, an important meeting. He was, *in fact*, on his way to his winter vacation in La Quinta, California (Joseph, R. 520-1). The so-called Portland meetings were simply a delay en route.

Moreover, experienced businessmen do not negotiate until they have first determined that negotiations are feasible, practicable and desirable. This requires knowledge of what is for sale and some basis of its acquisition. But under Joseph's testimony, he and O'Donnell were ignorant of either. At the time of the so-called meeting in Portland on November 18, 1952, actually consisting of a drink, dinner at the University Club and attendance at a night club thereafter (Joseph, R. 372-374), Joseph testified he was "unable to discuss the statistics of the deal as to price" because he had only "a sketchy outline of the deal" (Joseph, R. 374-5; *cf.*, 563). Joseph had asked Terman to obtain information about Kinzua from Needleman (Exhibits 4, 5, 361). Needleman, however, had refused to supply it because he considered it to be confidential (Needleman, R. 2763-4). Joseph also testified that he had sought information from Coleman, one of Kinzua's sales representatives, by long distance telephone, but Coleman had refused to supply it (Joseph, R. 356, 362). Even on November 19th, *the day after* counsel's "agreement" was supposed to have been created, Kinzua's sales representatives supplied insufficient data upon which to determine whether negotiations were feasible or desirable. Those representatives, as Joseph himself testified, withheld cruise data

and operating and financial statements pending deposit of \$600,000, which Joseph's counsel do not claim was even considered by Joseph (Joseph, R. 377).

Further, it is not the usual thing for experienced businessmen to assume the fiduciary obligations of joint adventurers with utter and complete strangers, particularly in a transaction of the magnitude of Kinzua's acquisition. In this case, not only were Joseph and O'Donnell strangers to each other (Joseph, R. 371), but Kinzua's acquisition necessarily required the assistance of others unknown and unnamed. Only in the most unusual circumstances could it be inferred that conversations between utter strangers could result in the formation of a contract of joint venture to negotiate for and acquire a multi-million dollar property requiring the assistance of others unnamed and unascertainable.

Counsel's inferences are erroneous. Joseph and O'Donnell did not come to Portland to "enter into negotiations for the purchase of Kinzua"; they came to Portland to find out *what* was for sale and *how* it could be acquired. They were not yet in a position to discuss co-adventurers. It was necessary to determine *whether* Kinzua's acquisition was desirable and feasible *before* they could determine *if* they wanted to negotiate, and *how* they wanted to negotiate.

It is clear from Joseph's own testimony that a decision "to negotiate" was not made even on Nov. 19, the day *after* Joseph's counsel claim he and O'Donnell "specifically and affirmatively agreed . . . [to] negotiate for and consummate the purchase of Kinzua. . . ." Thus Joseph testified that the following conversation

took place following the meeting with Kinzua's representatives on November 19 (Joseph, R. 380) :

“ . . . and the few minutes we had, he [O'Donnell] said, ‘Well, what this fellow has told us about all the timber they have got and what they have got out there looks like he might have something. I want to make some investigation about this thing, Joseph,’ so I said, to O'Donnell, ‘Well, now, you are in a hurry to get away. What do you want me to do, go back home and start get going on the financing of this thing?’ He said, ‘*No, let me handle it. Let me do some checking on this thing, and let me talk to my bankers and see what I can find out about it.*’ It was a very, very few minutes that I had to talk with O'Donnell, and he was off to get his plane.” (Emphasis added.)

The italicized words disprove counsel's claimed agreement. They were not words of commitment and agreement; and they are not promises. They are not even words of prophecy or expressions of future intentions. They are words of caution. If the words were uttered at all, they are a simple forthright expression by O'Donnell that he desired to obtain more information about Kinzua *before* making up his mind and *before* committing himself to anyone about anything.

Aside from the foregoing, the provisions of counsel's so-called “specific” and “affirmative” agreement are not even clear. They claim the “agreement” was “that Joseph and O'Donnell, *for themselves and groups headed by each,*” would negotiate for and consummate the purchase of Kinzua. We are unable to determine from counsel's statement whether the claimed “agreement” is between Joseph and O'Donnell themselves or between

Joseph and an unidentified group, on the one hand, and O'Donnell and an unidentified group on the other.

Either construction, however, *assumes* the existence of two groups to "consummate the purchase." But Joseph's own version of the record fails to reveal that such "groups" were in existence on November 18 and 19, 1952, or even that "groups" were discussed at the Portland meetings. There is not one scintilla of evidence in the record that O'Donnell had discussed Kinzua's purchase with any associates before he arrived in Portland on Nov. 18, 1952, and, of course, he had not. And Joseph himself testified that he did not discuss "groups" with O'Donnell. He testified (Joseph, R. 408):

"Q. Now, had you at any time up to this period, do you recall mentioned in any of your conversations with O'Donnell whether or not you were going to have associates with you?

"A. No, I don't think I did. All I said to him the evening we had dinner together on November 18 that we would take half the deal, *and what I had in mind* was myself and associates taking half the deal. We back in Chicago would take half the deal." (Emphasis supplied.)

It is too obvious to require comment that Joseph's testimony of what he "had in mind" is at best his own self-serving description of his state of mind, wholly unimportant, under ordinary principles of contract law, because, as he said, he had not "mentioned" it to O'Donnell.

Thus "groups" were discussed not at all during such conversations as Joseph and O'Donnell had in Port-

land, either on November 18 or 19, or later. The existence of "groups" headed by Joseph and O'Donnell exists solely as the brain child of counsel, conceived, obviously, of necessity. For the record is clear that Joseph could not and O'Donnell would not invest sums sufficient to acquire Kinzua by themselves. Joseph himself testified that he "had in mind" investing \$250,000 for himself and an equal amount for the Joseph Lumber Company, which he controlled⁴⁷ (Joseph, R. 483, 676). This obviously would be wholly insufficient to purchase one-half of the "vast timber empire" ultimately sold for 12 million dollars. Without, then, the imaginary birth of unknown, undefined and non-existent groups to give it vitality, the claimed relationship between Joseph and O'Donnell as equal joint adventurers would have died even before it was conceived.

We do not belabor the point further although we think we could do so *ad infinitum*. Counsel's statement, appearing on page 12 of their brief, that:

"They agreed specifically and affirmatively that Joseph and O'Donnell, for themselves *and groups* headed by each of them in Chicago and Seattle, respectively, should, as equal joint venturers negotiate for and consummate the purchase of Kinzua *on whatever suitable purchase basis could be arranged.*" (Emphasis supplied.)

is not fact. It exists only in counsel's enchanted world created by their own wishful thinking.

⁴⁷ The record shows Joseph was without means to provide even this amount. See Finding of Fact XII, Appendix II, pp. 47-8.

B. The Claimed Promises, If Made, Are Illusory and Are Too Vague, Indefinite and Uncertain with Respect to Essential Terms to Create a Contract Under Oregon Law

The non-existence of the contract counsel claims was created on November 18, 1952, need not be disproved by inference alone. It is disproved *directly* by Joseph's own testimony. Joseph himself testified (Joseph, R. 373-4).

"... O'Donnell said to me, he said, 'Joseph, what do you have in mind on this deal?' 'Well,' I said, 'O'Donnell, Raleigh told me all about you, and he has implicit confidence in you, and he is associated with you, and I understand you have been very successful as an operator, and I am looking for someone that we can get into this thing that can handle this thing out here for me. I am not a sawmill operator, and *if the deal looks all right to you and looks all right to ourselves, we will take a 50 per cent interest, and you fellows take 50 per cent interest,*' and he said, 'That is all right with me.' "

(Emphasis supplied.)

In Joseph's own words, then, neither he nor O'Donnell "agreed specifically and affirmatively" that they for themselves and nonexistent groups headed by them would "negotiate for and consummate the purchase of Kinzua *on whatever suitable purchase price could be arranged*" (Appellant's Opening Brief, p. 12). Contrariwise, if the words testified to by Joseph can be construed as a promise at all, either by him or by him and a so-called "group" he "headed," they are a promise that "we will take a 50 per cent interest" *only* "if the deal . . . looks all right to ourselves." No basis is out-

lined, however, upon which the “deal” might look “all right to ourselves.” Since Joseph was totally unfamiliar with timber and sawmill operations and of Kinzua’s holdings and of the price and other terms and conditions of its sale, it is safe to infer that he was in no position to define the conditions upon which “the deal” might look “all right to ourselves.” In any event, he made no effort to do so.

But Joseph was not even sure of the words which he claims bound himself and O’Donnell “for themselves and groups headed by each of them . . . as equal joint venturers [to] negotiate for and consummate the purchase of” a \$12,000,000 property (*Id.*). At the time of his deposition, Joseph, himself, did not testify that O’Donnell even agreed to the so-called “specific” and “affirmative” agreement by saying, “That is all right with me”; and when this was called to his attention upon cross-examination, he could not *remember* when he *first remembered* that O’Donnell had so stated. He testified (Joseph, R. 594-5):

“Q. When did you remember that Mr. O’Donnell, according to your testimony, agreed to this?

A. At the evening we were having a drink.

Q. When did you for the first time remember about his agreeing to this?

A. *I don’t remember when I remembered it.*”
(Emphasis supplied)

Nor could Joseph remember whether the claimed obligation was “we will *take a 50 per cent interest*” or whether it was “we will *raise half the money*.” At the time of taking his deposition he stated the obligation was “we’ll *raise half the money*” (Joseph Dep., R.

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 2311). When this was called to his attention on cross-examination, he said that he did not remember whether he said “*raise*” or “*take*” (Joseph, R. 594-596). He testified he may have said either (Joseph, R. 594, 596), but he *thought* he would have said “*take*” (Joseph, R. 594).

Finally, Joseph did not know whether the claimed obligation to “*raise half the money*” or “*take a 50 per cent interest*” was conditioned upon whether the deal looks all right “*to ourselves*” or “*to me.*” At the time of taking the deposition Joseph used the words “*to me*” (Joseph Dep., R. 2311), whereas at the time of trial he used the words “*to ourselves*” (Joseph, R. 373-4).

Thus, in three attempts to define the agreement which Joseph’s counsel claim binds “Joseph and O’Donnell, for themselves and groups headed by each of them . . . as equal joint venturers [to] negotiate for and consummate the purchase of” a \$12,000,000 property (Appellant’s Opening Brief, p. 12), Joseph himself was unable to state which one of four different versions was the actual agreement:

1. If the deal looks all right to *ourselves*, we will *take a 50 per cent interest*;
2. If the deal looks all right to *me*, we will *take a 50 per cent interest*;
3. *If the deal looks all right to ourselves*, we will *raise half the money*; or
4. If the deal looks all right to *me*, we will *raise half the money*.

Despite his uncertainty concerning the terms of the

alleged agreement, Joseph *was certain* he had *not* explained who “ourselves” and “we” were. As we have heretofore pointed out, he did not even tell O'Donnell that he expected to have associates with him in the deal (Joseph, R. 555-6). He further testified, albeit reluctantly, that at no time, either on November 18 or at any later time, did he give O'Donnell the names of any persons he believed might invest in Kinzua, nor did he indicate the amounts any of them might invest (Joseph, R. 555-6).

In summary, under the “agreement” appellant's counsel claim existed, it is impossible to determine *what* was promised; but if the so-called promises could be made certain, it is impossible to determine *who* was to be bound thereby, *i.e.*, whether Joseph and O'Donnell alone or Joseph and others and O'Donnell and others. If the latter be the case, the so-called agreement was entirely silent as to *who* those others might be. Thus there is complete uncertainty as to *what* was promised and as to *who* was obligated thereby.

The only thing certain about the so-called “specific” and “affirmative” agreement which counsel claims existed was that no one promised anything. For on Joseph's side of the so-called “bargain,” the obligation, *regardless* of *what* it was and *who* was bound thereby, became effective *only if* the deal looked all right “to me,” *i.e.*, Joseph, *or*, “to ourselves,” *i.e.*, Joseph and others unnamed and unascertainable; and on O'Donnell's side of the so-called “bargain” the obligation became effective only if “the deal looked all right” to “you fellows,” *i.e.*, O'Donnell and others unnamed and

unascertainable. Thus, the determination of whether the so-called promises, *whatever* they were, were ever to become effective upon anyone, rests exclusively in the untrammelled subjective determination of promisors unknown and unascertainable. Such "promises" are not promises at all.

In the Restatement of Contracts, Section 2, Comment (b), p. 4, it is said:

"An apparent promise which according to its terms makes performance optional with the promisor whatever may happen . . . is in fact no promise . . ."

Cf. 1 Williston on Contracts, Third Ed., Section 1A, p. 5.

In light of the foregoing, the "agreement" which counsel claims exists is obviously not a *contract* of joint venture. That "agreement" purports to be one having for its sole consideration the mutual promises of the parties. In such a situation, unless the promises are binding on each of the parties, the alleged agreement lacks consideration and is therefore not a binding contract. In Sec. 79 at p. 88 of the Restatement of Contracts, it is stated:

"A promise or apparent promise which reserves by its terms to the promisor the privilege of alternative courses of conduct is insufficient consideration if any of these courses of conduct would be insufficient consideration if it alone were bargained for."

In this case, both Joseph and his undefined group ("ourselves") reserved the absolute right not to participate in Kinzua's purchase, unless in their uncon-

trolled and untrammelled discretion, the "deal" looked "all right" to them. Even if a 50 per cent participation were offered them they were free to participate or not as they themselves saw fit. Thus they promised nothing. Nor did O'Donnell. *Cf., Lawrence Block Co. v. Paulson*, C.A., Calif. 1954, 123 Cal. App.2d 300, 266 P.2d 856.

But here there are other complications. Not only is the "agreement" vague, uncertain and illusory in the sense that the performance of the so-called "promises," *whatever* they are, are left to the untrammelled discretion of the promissors, *whoever* they are, but the persons ("ourselves" and "you fellows") who are to determine, even subjectively, whether the deal "looks all right" are unknown and unascertainable. Such an "agreement" obviously is not a binding enforceable contract. This is illustrated by the California case of *Toms v. Hellman*, 1931, 115 Cal. App. 74, 1 P.2d 31. There the court held that a contract looking to a corporate reorganization, some features of which were subject to the approval of a bondholders' committee not yet selected, was void for vagueness and indefiniteness. The court said at p. 35:

"The tentative nature of the offer is also shown by the provision for the approval of the committee to the form of the indentures. This uncertainty as to form also occurs in the provision for a release schedule of lands 'which may be adjusted by a majority of the Bondholders Reorganization Committee' and in another provision that 'the committee may enter into an arrangement with the company to exclude such amounts' from sales 'as are necessary in their opinion for sales commission,

etc.,' because the number and method of selection of the members of the committee was undetermined.'" (Emphasis supplied.)

A promise may be illusory for the further reason that it is too uncertain for possible enforcement. Thus, Professor Corbin says, 1 Corbin, Contracts, Sec. 95, pp. 289, 290:

"A promise that is too uncertain for possible enforcement is an illusory promise; but to determine whether or not it is an 'illusion' one must consider the degree and effect of its uncertainty and indefiniteness.

"Vagueness and indefiniteness of language may be such as to indicate clearly that the parties do not themselves understand that they are contracting. In such cases they are merely engaged in the inoperative process of preliminary negotiating."

This, we think, is the case here. The fact that Joseph was unable to tell which one of four versions of an "agreement" was created in Portland, could be explained, of course, by his duplicity, but it could also be explained upon the ground that during their Portland meetings, Joseph and O'Donnell did not intend to make reciprocal promises amounting to a contract. Thus in *Reed v. Montgomery*, 1947, 180 Or. 196, 175 P. 2d 986, the Oregon Supreme Court said at p. 993:

"We believe that the contradictory testimony which Plue gave concerning his part in financing the venture was not due to a lack of probity on his part, but to the fact that the respondent and he had not discussed the subject of financing sufficiently to afford either of them a clear conception of what was to be done. Discussions, no matter how ade-

quate, do not necessarily produce contractual relationships, but normally no contractual relationship is brought about as the result of discussion unless it is carried on to such an extent that the minds of the parties meet upon all of the essential terms of the proposed venture.”

It is obvious in this case that Joseph’s and O’Donnell’s discussions had not been carried on to the point that their minds had met upon the essential terms of a venture having for its object the acquisition of a multi-million dollar property. For the purchase of Kinzua obviously required the raising of large sums of money, the extension of large credits, the drafting of large security devices, corporate dissolutions and an analysis and solution of many complicated operating, tax and legal problems before its property could be acquired and operated. These problems were discussed not at all in Portland, and only a few of them, if any at all, were discussed even slightly thereafter. Certainly no agreement even in *general* terms was entered into between Joseph and O’Donnell with respect to any of them.

In this case, before the so-called “agreement” which counsel claims existed could become a binding contract, the court would be required, not only to fill in the foregoing gaps in the “agreement” itself, but to supply additional unnamed and unascertainable co-adventurers to participate in Kinzua’s acquisition and to define their fiduciary obligations to each other. This, of course, is a judicial impossibility. *For we know of no provision of law which will supply additional but unnamed co-partners or co-adventurers able to provide equity capital and define their rights and obligations to each other.*

In view of the fiduciary relationship which co-adventurers occupy toward each other it is obvious that the law will not foist such additional co-partners or co-adventurers upon another without his actual consent. *Cooper v. Kensil*, N.J. 1954, 106 Atl.2d 27, 31. In that case the plaintiffs claimed a contract right to participate in a project in which one of their associates was a joint adventurer with others. In holding that the alleged contractual provision was void for vagueness and uncertainty, the Court said at p. 31:

“It is conceivable that an interest in a project originated and promoted by strangers could be offered to one of the four stockholders of Maple Shade—that the originator of such a project might want one or less than all of those interested in Maple Shade as associates and not want the balance of such stockholders. Was it the intent of this agreement *to foist* such undesirables upon the new syndicate or prevent the *persona grata* from entering into such a new contract? *The former it could not do* and the latter was not the clear intent of the parties.” (Emphasis supplied.)

If it were possible to foist additional co-partners and co-adventurers upon another without his agreement and consent, the relationship of the parties would cease to be voluntary and hence not a partnership or joint adventure; for by definition that relationship can exist only by the *voluntary* action of the parties themselves. Cf., *Preston v. State Accident Commission*, 1944, 174 Or. 553, 149 P.2d 957.

No binding contract of joint venture to acquire Kinzua could arise until the co-adventurers had been selected, and each of them had agreed upon all the essen-

tial terms of the venture; for these are matters which the Oregon courts will not supply for the parties if they have not done so themselves.

Thus in *Reed v. Montgomery*, 1947, 180 Or. 196, 175 P.2d 986, the Oregon Supreme Court said at p. 993:

“We think it is evident that many important phases of the contemplated relationship were left unmentioned in the discussion and in the writing. The alleged partnership proposed to engage in extensive operations involving the expenditures of large sums for payrolls, equipment and timber purchases. Moreover, the methods of operation, according to Plue’s version of them, would be complex. For instance, the paper he depends upon seeks to create a partnership between the respondent as ‘first party’ and another unit consisting of himself and Reed as ‘second party.’ If the appellants are not a partnership or a joint enterprise, we are at a loss to know the nature of their association. To this complex structure it was proposed to add, according to the appellants, a co-operative association to be owned, somehow, by fifty or so woodworkers who would contribute \$1,000 each. The mill which it was proposed to use was owned, not by the alleged partnership or co-operative, but by the respondent and an associate of his. We think that even the most versatile of lawyers would have to consume many hours with his clients and submit for their consideration many drafts of agreements in efforts to write a workable agreement between these several groups of conflicting interests. The groups themselves, in all likelihood, would have to make many revisions in their plans before the attorney could succeed in bringing them to agreement.”

and further at p. 996:

“We can not fill out the agreement for the parties, and yet unless there is inserted in it a covenant favorable to the appellants concerning the timber, they are entitled to no relief. It necessarily follows that the agreement is incomplete, and, therefore, unenforceable.”

Cf., *Mason v. Rose*, 2 Cir. 1949, 176 F.2d 486; *Brown v. Bivings*, 1954, Okla., 277 P.2d 671; *Sticelber v. Iglehart*, 1934, 169 Okla. 453, 37 P.2d 638; *Greenbaum v. Kirkpatrick*, W.D. Okla. 1955, 129 F.Supp. 648.

C. The Words Which Counsel Claims Were Uttered on November 18, 1952 Were at Most Words of Prophecy

It is abundantly clear from the foregoing that counsel's so-called “agreement” is entirely too indefinite and vague to constitute an enforceable contract of joint venture. That vagueness and uncertainty extends (1) to *what* was promised, (2) to *who* was to determine if and *when* the promises were to become effective, (3) to *how* the determination was to be made, and (4) to *who*, in any event, were to be bound thereby. The indefiniteness and vagueness of the contract leads to but one conclusion. If the words which Joseph testified he and O'Donnell expressed to each other on November 18 and 19, were actually uttered by them at all, they amounted to no more than words of future prophecy. They could not be more; for too many essential matters remained to be worked out between them. *Cf.*, *Dimitri Electric Company v. Paget*, 1944, 175 Or. 72, 151 P.2d 630. In this case the Supreme Court of Oregon held that the words, “If you can keep your price within twenty to twenty-five dollars, I will give you an order for the

whole business," even though accepted, did not constitute a contract. In so holding, the Oregon Supreme Court said (151 P.2d 634, 635):

"We are convinced that the conversations which occurred in May of 1941, or thereabouts, were not deemed by Curry and Cosgrove at that time as forming a contract. We believe that the evidence merely shows that Cosgrove, before starting construction of the twenty houses, and before arranging for his mortgage loans, was anxious to know whether electrical fixtures were available at a price of twenty to twenty-five dollars for a house. If the plaintiff could sell at that price, Cosgrove intended to buy from them when the time arrived for making selections. Cosgrove's words 'If you can keep your price within twenty to twenty-five dollars, I will give you the order for the whole business,' in our opinion, did not mean that right then and there he contracted to buy twenty sets of fixtures. When those words were spoken, the excavation work had not yet begun. Similar words—equally promissory in character—are frequently employed by people while negotiating a future contractual relationship. In such instances, *if the parties contemplate further negotiations for the settling of undetermined terms, the words are deemed mere expressions of intention or of prophecy. In the present instance, the fact that the determination of kind, price and number of fixtures would have to wait until purchasers for the houses had been found and their whims had been gratified, is a clear indication that Cosgrove's words, 'I will give you the order for the whole business,' were a mere expression of intention.*" (Emphasis supplied.)

Further argument, we think, is unnecessary. Appel-

lant's counsel in this case face the same insurmountable difficulties that faced the plaintiff in *Reed v. Montgomery*, 1947, 180 Or. 196, 175 P.2d 986, 996. In that case the Oregon Supreme Court said:

“Two insurmountable difficulties, therefore, confront the appellants: (1) The parties, as the circuit court's findings point out, did not intend in any of their other discussions to effect a contractual relationship, although Plue and the respondent looked forward to entering into some sort of agreement in the event that Plue could procure the needed sums of money; and (2) if the writing upon which this suit is predicated could be deemed a contract, it is incomplete. We do not hold that it is essential to the consummation of a contract that the parties intend to contract, but deem the expression of an assent as indispensable to the formation of an agreement. None of the parties, in our opinion, assented to the consummation of a contractual relationship.”

But here counsel face *another* insurmountable difficulty as well. The promises of the parties are illusory. The parties promised nothing. Hence, their so-called “agreement” lacks consideration necessary to create a binding contract of joint venture.

There is nothing in Joseph's testimony regarding events occurring subsequent to November 19, 1952 which would be sufficient, standing alone, to constitute a contract of joint venture between Joseph and O'Donnell, either expressly or by implication. Joseph's case necessarily depends upon establishing a contract of joint venture between Joseph and O'Donnell during their Portland visits on November 18 and 19.

In this section of our brief, we have assumed, arguendo, the truth of Joseph's version of the facts. We have demonstrated that even his version negates the existence of a contract of joint venture between him and O'Donnell.

The trial court, however, did not accept Joseph's version of the facts. It found O'Donnell to be an entirely trustworthy witness; and where O'Donnell's testimony contradicted that of Joseph, the trial court found in accordance with O'Donnell's testimony. The trial court's findings of course are presumed to be correct. But under any view of the record, the conclusion is necessarily compelled that Joseph and O'Donnell never became joint adventurers.

CONCLUSION

This appeal is concerned with fact issues. Appellant raises no point of law that has an existence independent of them. Those issues do not arise from the trial court's disregard or misunderstanding of any definite and well-established fact. Appellant's complaint is nothing more nor less than that the trial court, in weighing the evidence and judging of the credibility of the witnesses, evaluated and interpreted the evidence differently than appellant desired.

The resolution of the fact issues involved in this case necessarily required a determination of designs, motives and intentions of appellant and O'Donnell with respect to acts that occurred long before the trial in the court below. Their resolution depended peculiarly upon the evaluation and interpretation of conflicting oral

testimony of witnesses having a direct interest in the outcome of the case.

Evaluating the lengthy and complex record and judging of the credibility of the witnesses, the trial court found the facts adversely to appellant's position and in favor of appellees'. Those findings are not clearly erroneous. On the contrary they are supported by substantial, credible and competent evidence. They are entirely reasonable. They are in fact the only rational findings an objective trier of the fact could make on the record. Hence, there is no factual or legal basis for this court to retry the case *de novo*.

No rule of law was violated. The trial court's findings are clearly correct; they should not be disturbed.

The lower court's judgment of dismissal with prejudice should be affirmed.

Respectfully submitted,

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No. 15669

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY JOSEPH,

Appellant,

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL: RALEIGH CHINN: KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER: E. W. STUCHELL: D. E. WYMAN and M. H. WYMAN,

Appellees.

APPELLANT'S OPENING BRIEF.

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No. 15669
IN THE

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HARRY JOSEPH,

Appellant,

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL: RALEIGH CHINN: KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER: E. W. STUCHELL: D. E. WYMAN and M. H. WYMAN,

Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal by plaintiff from a judgment of dismissal of plaintiff's cause of action pursuant to the trial court's granting of a motion to dismiss under Rule 41(b), Federal Rules of Civil Procedure [Tr. 283-284]. Plaintiff's cause of action was for imposition of a trust upon one-half of the stock of Kinzua Lumber Company [Tr. 3-9].

Jurisdiction.

This is an action based upon diversity of citizenship of the parties and the matter in controversy exceeding, exclusive of interest and costs, the sum of \$3,000 [Pre-trial Order, 153-154].

Jurisdiction is conferred on the trial court by 28 U. S. C. 1332. Jurisdiction is conferred on this court by 28 U. S. C. 1291.

Judgment herein was rendered and filed on June 3, 1957 [Tr. 283-284]. Notice of Appeal was filed by plaintiff on June 27, 1957 [Tr. 285].

Statement of Points.

The statement of points on which plaintiff intends to rely on this appeal is as set out in plaintiff's original statement [Tr. 287-288]:

1. The Court erred in entering its judgment and conclusions of law for defendants, when such judgment and conclusions were unwarranted and unsupported by the findings of fact.

2. The Court erred in making the findings of fact which it rendered, in that such findings of fact were contrary to the evidence and clearly erroneous, the evidence establishing the existence of a joint venture, its non-termination, the taking from him of plaintiff's right to a half participation in the Kinzua purchase and operation, and plaintiff's right to relief.

3. The Court erred in failing to hold that the evidence established the existence of a joint venture in the Kinzua purchase and operation, the taking from plaintiff of his right to a half participation therein, and plaintiff's right to relief, and in failing to hold plaintiff entitled to one-half of the Kinzua deal upon appropriate payment, and in failing to proceed to the taking of evidence to determine and adjudge plaintiff's precise entitlements and participations.

4. The Court erred in dismissing plaintiff's action against all defendants, or any of them.

5. The Court erred in granting the motion of defendants to dismiss the action on the ground that plaintiff

had shown no right to relief on the facts and the law, or on any ground.

6. The Court erred in limiting discovery procedures by plaintiff narrowly to the single issue of the liability of defendant O'Donnell.

Statement of the Case.

Plaintiff Harry Joseph brought this action in the District Court of the United States, Western District of Washington, Southern Division, to impose a constructive trust on, and obtain an accounting with regard to, 50% of the capital stock of Kinzua Lumber Company, a corporation which directly or indirectly owned valuable timberlands, lumber mills and other valuable properties in Oregon [Complaint, Tr. 4-8].

The defendants were Harry O'Donnell, a Seattle businessman [Complaint, Tr. 3]; Donover Company, a corporation controlled by defendant O'Donnell [Complaint Tr. 5]; Alvin Schwager, E. W. Stuchell, D. E. Wyman, M. H. Wyman, Bryant R. Dunn and Raleigh Chinn, all purchasers of Kinzua stock [O'Donnell Answer, Tr. 68], and friends of O'Donnell; Capital Timber Company, a corporation (which purchased 50% of the Kinzua stock) [Capital Timber Company Answer, Tr. 44], and its Trustees in Dissolution, Mark F. Mathewson and Richard K. Bush; and Kinzua Corporation.

Plaintiff charged in his complaint that he had discovered and obtained information concerning the purchase of Kinzua Lumber Company and decided to invest to the extent of 50% himself [Complaint, Tr. 5].

Plaintiff sought an experienced timber operator in the Pacific Northwest as purchaser of the other 50%, and to this end approached defendant Raleigh Chinn, whom he relied upon [Complaint, Tr. 5].

Chinn referred plaintiff to Harry J. O'Donnell, as "just the man." [Complaint, Tr. 5.] O'Donnell agreed with plaintiff to buy Kinzua equally, together with the associates of O'Donnell and Joseph [Tr. 165], if Joseph and O'Donnell were satisfied the stock should be bought.

However, plaintiff alleged, defendant O'Donnell in violation of his trust, and acting for the other defendants, bought Kinzua for himself and them without advising plaintiff of this [Complaint, Tr. 7], and while Joseph, lulled by representations of O'Donnell, relied on such representations and hence did not himself negotiate for the Kinzua purchase [Complaint, Tr. 6-7].

All the shares of Kinzua Lumber Company were purchased by defendants for the total purchase price of \$12,250,000, of which \$3,343,000 was paid in cash [Tr. 202]. The shares went as indicated in this table, taken from O'Donnell's Answer [Tr. 68]:

Purchaser	Shares of Capital Stock Purchased
Harry J. O'Donnell	837.2
E. W. Stuchell	1,196
Max H. Wyman	1,554.8
David E. Wyman	1,554.8
Raleigh Chinn	119.6
Alvin Schwager	239.2
Bryant R. Dunn	119.6
Capital Timber Products Company	5,980
Donover Company, Inc.	358.8

The Capital Timber Products Company was the company of Howard Webster, a Canadian financier who agreed with O'Donnell to take 50% of the Kinzua stock [Findings, Tr. 267].

In answering, defendants were represented by four legal firms.

Six separate answers appear at pages 33-115 of the transcript. These answers generally deny the existence of a joint venture and assert whatever relationship there may have been did not constitute a contract [O'Donnell's Statement of Issues, Tr. 221]; they deny the existence of a fiduciary relationship [Tr. 222], and they deny any breach by O'Donnell [Tr. 222]. They further assert that any relationship that may have existed was terminated and abandoned by Joseph [Tr. 222], and that plaintiff's claim is barred by laches [Tr. 234].

Capital Timber Products Company and its trustees in dissolution also filed a cross-claim against O'Donnell, charging that O'Donnell never told them of plaintiff or of the relationship between plaintiff and O'Donnell which plaintiff asserts [Tr. 44]. The cross-claim asserts that if plaintiff prevails, O'Donnell's representations that the 50% of Kinzua was available for purchase would be false, and known to O'Donnell to be false [Tr. 45]; and that should plaintiff establish a denied agency or joint venture relationship between O'Donnell and Capital Timber Products Company, O'Donnell's failure to disclose would constitute a breach and violation of fiduciary duty by O'Donnell [Tr. 45]. In such event, the cross-claim asks recovery against O'Donnell for damages and judgments against Capital thus incurred [Tr. 45-46].

The trial court ordered separate trial of issues in the following order:

(a) Plaintiff's right to relief, if any, against the defendant Harry J. O'Donnell;

(b) Plaintiff's right to relief, if any, against the other defendants, or any of them;

(c) The remedial relief, if any, to be afforded to plaintiff, including the imposition of a constructive trust upon the shares of Kinzua Lumber Company capital stock, the tracing of assets of Kinzua Lumber Company, and the

accounting for profits and accretions, and such other relief as plaintiff seeks;

(d) The right of cross-claiming defendants to relief upon their cross-claim against the defendant O'Donnell.

The trial court limited the scope of discovery examinations and proceedings to matters relevant to the subject matter of the issue next to be tried [Tr. 228-229].

Trial was held, limited only to the issue of O'Donnell's liability to plaintiff, before Honorable George H. Boldt, commencing September 24, 1956 [Tr. 306], and continuing until November 27, 1956 [Tr. 2000], with various interruptions.

In addition to plaintiff and his witnesses, extensive examination was made of adverse witnesses Chinn, O'Donnell and Dunn, among others. O'Donnell was concededly the leader of the Seattle group who acquired among them 50% of the Kinzua shares.

Defendants, prior to the close of plaintiff's case, also put on, out of order, two witnesses: Dr. Thomas Holmes and Honorable William J. Lindberg, United States District Judge.

Numerous and extensive depositions, both of persons who testified at the trial and of those who did not, were introduced into evidence.

At the close of plaintiff's case, defendants moved for dismissal under F. R. C. P. Rule 41(b) [Tr. 2035-2037]. The trial court stated that ". . . most, if not all, of the adverse parties have been interrogated at very great length and in great detail concerning the transactions in question, and, accordingly, the evidence of all the principals almost without exception, is before me." [Tr. 2037.]

Following oral argument, the court on January 18, 1957 granted the motion in an oral decision [Tr. 4246, *et seq.*], followed by Findings of Fact and Conclusions

of Law of June 3, 1957 [Tr. 244], and Judgment, also of June 3, 1957 [Tr. 283].

This appeal followed in due course, based in large measure on the insufficiency of the facts to support the findings, and of the findings to support the judgment that there was no joint venture or that it was terminated, or that plaintiff was barred by laches. These findings, and the judgment based thereon, are urged to be clearly erroneous as contradicting the evidence, including many admissions of the defendants themselves.

Brief Summary of Argument.

Plaintiff in this suit in equity urged the creation and existence of a joint venture agreement between plaintiff and Harry O'Donnell and his group with respect to the joint purchase of the valuable Kinzua Lumber Company. Judgment was for defendant following the granting of a motion for dismissal at the close of plaintiff's case under F. R. P. C. Rule 41(b).

Plaintiff and appellant urges on this appeal that the conclusions of law and judgment are unsupported by the findings of fact; that the findings of fact are unsupported by the facts and clearly erroneous; that the trial court should have denied the motion and held instead that the evidence, particularly documents and the admissions of defendants plainly established the existence and enforceability of the joint venture agreement.

We point out that under the cases the startling admissions, the powerful documentary evidence, and the incredible and self-contradictory testimony of defendants, many of whom have testified extensively as adverse witnesses, together with certain of the findings themselves, place this court under the authorities in a position wherein reversal for the clearly erroneous character of vital findings is plainly indicated.

Dividing the argument of the complex factual situation into manageable categories, we first set out our summary of our own position as to the facts. Next, we indicate the grossly erroneous character of the findings purporting to deny the existence of the joint agreement, which we submit is virtually admitted by the testimony, and is admitted over and over again by the admitted actions of the defendants themselves, and buttressed even by some of the factual findings themselves.

A section on the total lack of credibility of defendants O'Donnell and Chinn is included. Here we set forth characteristic examples of the remarkable compelled admissions, sly evasions, self-contradictions and contradictions of incontrovertible documents, which constitute the warp and woof of the testimony of O'Donnell.

In other sections we show that the conduct of O'Donnell, despite contrary assertions and conclusionary findings, was always—until the time of betrayal and exclusion of Joseph—such as necessarily to imply, support and acknowledge the existence of the joint venture agreement with Joseph, and that Joseph's conduct implied, buttressed and was in strict accord with the joint venture agreement and any obligations thereunder.

We also show that O'Donnell, despite contrary conclusionary findings, never intended to drop or dropped the Kinzua deal.

The total inapplicability of laches, speculative delay, and estoppel is next shown; Joseph neither sought nor received gain from delay, nor actually delayed in efforts to bring O'Donnell and his group to justice. Nor did O'Donnell or his group ever genuinely lose anything whatever from whatever passage of time transpired between their gross breach and commencement of suit.

Finally, the applicability of the law of joint venture and of fiduciary obligation to the shabby betrayals by O'Donnell of Joseph is briefly shown.

ARGUMENT.

I.

Here Plaintiff States His Case—That Plaintiff, Learning of and Having Access to a Unique and Valuable Opportunity to Acquire an Enormously Valuable Timber Empire on Extremely Favorable Terms and Entering With Defendant O'Donnell Into a Joint Venture to Purchase the Same Equally, Was Pushed Out of His Own Deal by O'Donnell, a Fiduciary Who Sought to Purchase for Himself and Those of His Choosing, in Violation of His Trust, and Must Now Be Held to Account.

This appeal necessarily involves a long and complex analysis of evidence, even though it will be boiled down as far as may be. This preliminary discussion then, is, without any citations or apology for their absence, simply a recounting of plaintiff and appellant's general position as to the significance of the lengthy evidence on this appeal. In later portions of this brief, citations to the record will be carefully made, of course; this section is simply a summary of what we believe the facts show by the record are.

(a) Admissions and Undenied and Documentary Evidence Establish This Case.

Defendants in this cause are condemned from their own mouths. Plaintiff urges that the admissions of defendants alone virtually require judgment for plaintiff as an equal joint venturer in the purchase of a vast lumber company, cunningly pushed out of his own deal by O'Donnell.

Admittedly, Chinn and O'Donnell learned first of the availability of the Kinzua Lumber Company for purchase from plaintiff and his broker Sam Terman, and from them alone.

Admittedly, plaintiff arranged for Chinn, O'Donnell and himself the Portland meeting on November 19, 1952, with Coleman, representative of the sellers of Kinzua. Admittedly, immediately after this meeting O'Donnell's lawyer Dunn framed the acquisition plan and O'Donnell conferred with bankers about financing of the purchase.

Without denial by Chinn and O'Donnell, Harry Joseph testified that at the time of the Portland meeting, Joseph and O'Donnell agreed that Joseph and his group would take a 50% interest, and O'Donnell and his group would take a 50% interest, in the purchase of the Kinzua Lumber Company. O'Donnell and Chinn admitted being with Joseph at the time of the conversations, but said they could not recall the conversations.

Admittedly, O'Donnell kept in contact with Joseph over a period of months and give him information about newly discovered facts as to Kinzua and the method of acquisition.

Admittedly, O'Donnell and his Seattle group could not finance the entire purchase, and admittedly Joseph was to raise what he could in the East; then the Joseph and O'Donnell groups, admittedly, were to sit down and allocate. Admittedly, O'Donnell had no more right to perform this allocation than Joseph.

Undeniedly, Joseph worked in Chicago to secure, and did secure, qualified, responsible and fully adequate investors, then and now committed to put up monies adequately taking care of the Joseph's group 50% of the deal.

Admittedly, Joseph, in March 1953, was called by O'Donnell and told that the matter would need to be further looked over. Admittedly, it was weeks after that that the financial statements of the seller were obtained; and further months until the essential cruise, or inspection, of the timber was obtained. Admittedly, O'Donnell, a few weeks after seeing the balance sheets, went out

and got another investor for Joseph's 50% of the deal. Admittedly, he never contacted Joseph thereafter, or tell him of the favorable balance sheets or timber reports, until the deal was concluded with the other investor, and was pointedly asked for explanation by Joseph.

Admittedly, O'Donnell wrote a letter of explanation which has many untruths therein. The letter attempts to make the deal with the other investor look like a casual happenstance, instead of the earnestly pursued endeavor which it admittedly was.

We say that, on the state of the record, with this and many other admissions, the necessity of judgment for plaintiff is clear. O'Donnell can do no more than assert, weakly, that he thought Joseph wanted out of the deal because another investor, A. C. Allyn, assertedly wanted out; but he admits Joseph never told him he would be out if Allyn were out, and that he never got back to Joseph about the Allyn delay.

Here is no evidence of abandonment; yet outside of this O'Donnell and the co-defendants, pressed to it by searching examination and documentary evidence, have had to give away every essential element of their defense from their own mouths.

(b) A More General View of the Evidence.

Harry Joseph, a Chicago businessman of absolutely unquestioned integrity and means, learned from a California real estate agent and friend, Sam E. Terman, of the existence of a wonderful opportunity for purchase of Kinzua Lumber Company, a vast timber empire in the Pacific Northwest. Joseph, eager to enter on the purchase of this great enterprise, contacted a long-time friend and acquaintance of his, one Raleigh Chinn, whom he knew and had done business with over a period of many years, and asked Chinn whether he knew of someone who

had both the experience and the means to enter into such a deal with him.

Chinn suggested Harry O'Donnell, a Seattle lumberman of education, wealth and experience, whom Chinn knew very well.

Thereafter, Chinn, O'Donnell and Terman met in Los Angeles on November 6, 1952. On or about this same date, as the result of Terman's prodding of Gold & Needleman, Joseph Coleman, President of Kinzua, called Joseph and discussed the availability of the Kinzua stock at a price of \$12,000,000. Joseph and Coleman agreed on a meeting, to be held in Portland, Oregon, at the Heathman Hotel on November 19, 1952. Joseph called Chinn and advised him of the date and place of the meeting. Chinn agreed to meet Joseph in Portland on the night of November 18th, and to bring O'Donnell with him.

They joined him at the Old Heathman Hotel in Portland on November 18, 1952, the day before the meeting. They spent the entire late afternoon and a long evening together, and of course discussed earnestly their relationship in the venture upon which they had come to embark—the purchase of the multi-million dollar Kinzua lumber empire.

They agreed specifically and affirmatively that Joseph and O'Donnell, for themselves and groups headed by each of them in Chicago and Seattle respectively, should, as equal joint venturers negotiate for and consummate the purchase of Kinzua on whatever suitable purchase basis could be arranged. Joseph specifically made it clear to O'Donnell that he, Joseph, regarded himself as both morally and legally bound to pay to Terman a commission of 5% on the transaction as and when the purchase was made. O'Donnell expressed the view this was quite expensive and asked whether Terman wanted it all in cash.

Joseph gave it as his view that Terman might be willing to take all or some part of his commission in terms of stock or other participation in the deal. O'Donnell was equivocal as to payment of the commission.

On November 19, 1952, O'Donnell, Chinn and Joseph had a lengthy discussion with Coleman and his attorney, Casey. During this discussion, the character and extent of the properties were outlined in considerable detail. At the conclusion of the conference with Coleman and Casey, O'Donnell stated to Chinn and Joseph that if Coleman's representations as to the quantity and quality of the timber were true, the properties would be worth the asking price.

While it is not certain, it is quite likely that Joseph's loyalty to his duty to Terman was a main reason impelling O'Donnell to his desire to shake out Joseph as the provider of the other 50% of the financing. What *is* certain is that later actions by O'Donnell were carefully calculated to prevent, and did prevent, Joseph from remaining part of the very deal which he initiated; he was entirely shut out of it, and read of its consummation only in the newspapers.

O'Donnell, by patient maneuverings over a period of months, arranged a deal wherein Joseph was euchered out of his share of the deal.

Almost immediately upon the return of Chinn and O'Donnell from Portland, O'Donnell, who admittedly led and headed the actions of the Western or Seattle group at all times, swung into action—which never thereafter ceased, despite any assertions or pretenses to the contrary.

In the month of November, Harry Joseph met in the offices of Gold & Needleman with Coleman, Gold, Needleman and Terman present, and put in a call to O'Donnell in Seattle, in which it was agreed that O'Donnell would

contact Coleman for an inspection of the Kinzua properties. Such an inspection was made, limited by snow, of a portion of the properties.

O'Donnell held conferences with Western bankers concerning the possible financing of the operation; he conferred with other defendants concerning financing of the Seattle group's half of the deal. He went to work with his accountant and his attorney, Bryant Dunn, another defendant, to work out the basis on which the property could most advantageously be acquired. Dunn did so work out the basis, as early as December of 1952. It involved generally acquisition of Kinzua stock by the buyers, dissolution of Kinzua, distribution of its assets, and taking of a capital gain on the new basis by disposition of the assets. This is the plan which was in fact ultimately adopted and put into operation.

The process of squeezing Joseph out commenced early. After having Dunn advise Joseph early in December of 1952 of the basis of the acquisition, as set forth generally above, O'Donnell seized on a brief indisposition of his wife (who had been ill before but was constantly improving) to announce to Joseph by telephone on December 19, 1952 that he was not going forward in any way with Kinzua, and considered himself and his group out of it.

In actuality, both before and after this phone call, O'Donnell proceeded relentlessly with activity in regard to the Kinzua purchase.

He continued to look for people to operate it with him, and for outside investors to handle the half of the transaction that was all he and his Seattle friends ever felt could or intended to finance.

He went off to Palm Springs for most of the winter, meanwhile telling Coleman, tongue-in-cheek, that he was

very little interested and that possibly another organization called Georgia-Pacific might be interested. In actuality, he continued to be vitally interested. However, he wanted to secure as favorable terms from the Kinzua owners as possible. He was keenly aware that during the winter, when no one could examine the snowbound Kinzua properties, no other serious negotiations could take place; so he ran no risk by expressing such pretended indifference. He intended to and did complete the negotiations later on. He also arranged during the winter for the earliest possible inspection.

From now on until March 31, 1953, he communicated with Joseph by telephone (O'Donnell was always nervous about documentation that might reveal his plots), but in so communicating he was rather vague and cagey, and revealed nothing to Joseph of how he actually hoped or planned to make his deal. Joseph innocently and in good faith had gotten his financing ready in Chicago; he and a group of prominent Chicago businessmen stood—and still stand—fully ready and able to invest their contemplated one-half share in Kinzua.

Meanwhile, even in Palm Springs, O'Donnell conferred with the Colemans, planned later examination of the timber, made arrangements to secure management, and consolidated relationships as to financing with many of the other defendants, who were either winter residents of Palm Springs themselves, or at least made visits there during which Kinzua was carefully discussed.

When Joseph heard on December 19th that O'Donnell was getting out of the Kinzua deal, Joseph sought to secure financing for the half of the deal that his Chicago group had not already agreed to take. He went to A. C. Allyn and Company, an important Chicago investment firm, and spoke to Mr. A. C. Allyn concerning their possible interest. To Joseph, A. C. Allyn was purely a possible

substitute for O'Donnell's half of the money, a possible supplement to the participation of his own Chicago group, necessitated by what momentarily appeared to be the drop-out of O'Donnell.

O'Donnell talked to A. C. Allyn's representative. Later Allyn, having another deal going which was temporarily occupying its energy, announced in April through its Western representative that it could not proceed for a period of four to six weeks.

O'Donnell at the trial seized on this to assert two untruths; one was that Allyn was really out, or that if they were not, a delay of so many weeks was just as bad. (Actually, as O'Donnell well knew, it would in any case, and did, take far longer than that to complete the deal.) The other untruth is that Joseph had told him in phone conversations that Joseph was in the deal with Allyn, and that O'Donnell should deal entirely with Allyn.

In actuality, Joseph never told him any such thing, nor is there any documentation of such a statement. Indeed, Allyn testified he was not acting for Joseph. And the Allyn people were so poorly acquainted with Joseph's role that their Western representative Marshall, puzzled, admittedly asked O'Donnell whether Joseph was an agent. O'Donnell never had any illusions on this subject; but pretended to have, for it suited his freeze-out plot exactly.

Joseph never, even by O'Donnell's statement, told him that he'd be *out* with Allyn; only that he'd be *in* with them. Yet O'Donnell never called him after the temporary engagement of Allyn in other projects, to advise him of the fact or ask what else he wished to do.

For now it was Spring. Now the voice of the turtle was heard in the land; and the snow was gone and now Kinzua could be examined and checked out. It was, and proved eminently satisfactory. Now, by shabby cheating shifts, Allyn could be counted out, and Joseph covertly and sneakily avoided; they were.

Joseph was stalled off by a statement that a thorough examination of the timber had to be made after March 31st, and that O'Donnell then would get back to Joseph.

Now, new financing, not painstakingly concerning itself with any obligation of 5% commission to Sam Terman, could be obtained; and it was. With infinite patience and resourcefulness O'Donnell bent every effort to reach one Howard Webster, a Canadian financier of great wealth. He had to do this with some difficulty through Hugh Kelleher, a financial advisor of Webster's. (Even here, almost amusingly, we observe that O'Donnell was true to his code of squeezing out and denying any commission; the record is replete with the shabby story of how he later squeezed Kelleher out of any substantial compensation for his efforts.)

Breezily denying later he had given Kelleher the precise information, he gave Kelleher the precise information, physical and financial, concerning Kinzua Lumber Company, which enabled Kelleher to write for Webster a memorandum, persuasive and explicit, which did in fact help persuade Webster that he should invest the required 50% of the Kinzua money.

The final selling was done by O'Donnell in a single meeting of perhaps an hour with Webster—far, far less time than O'Donnell spent with Joseph in Portland.

O'Donnell acknowledges however that he regarded this verbal agreement as binding, and that consequently, since it provided for half for Webster and half for O'Donnell's group, it had to be honored and Webster given half—even though O'Donnell stated he might have been able to get up \$2,500,000 or so of the earlier planned down payment and now was only required to get up less than \$1,800,000, half of \$3,600,000.

In August, 1953 the papers to consummate the purchase from Kinzua owners, after considerable lawyer's negotiations and work over details, were completed. No more money than the down payment ever needed to be put in. The deal was a smashing success, probably earning substantially in excess of ten million dollars after taxes. Joseph knew nothing of it. O'Donnell was found out when Joseph in later August, 1953, observed an item in a paper and wrote to O'Donnell. O'Donnell waited three weeks to reply, then wrote back a truly extraordinary letter crammed with untruths and asserting in particular that for months he had let the deal lay dormant, and then had happened to run into a Canadian and happened to make the deal (!).

Joseph and his Chicago group, then, were shut out by O'Donnell of the Kinzua purchase which had discovered and brought to O'Donnell, and agreed with him to make together and equally.

And the result is, we say, that a constructive trust exists in favor of plaintiff, as to one-half of the Kinzua stock and proceeds, subject of course to plaintiff's paying for the same as was agreed.

II.

To the Extent That, as Here, the Challenged Findings Are Necessarily Based Upon Matters as to Which There Are Admissions by Defendants and Undisputed Matters and Documentary Evidence or Such Findings Are Conclusionary in Character, the Reviewing Court Does Not Give Great Weight to the Findings of the Trial Court.

The general principle that the trial court's findings are entitled to great weight and respect by a reviewing court, sound and salutary as it is, finds its application only where those findings genuinely depend upon the trial court's evaluation of the credibility of witnesses appearing before it whose testimony is conflicting and contradictory.

However, where the reason ceases, the rule ceases also. An appellate court can, as well as the trial court, evaluate testimony which is undisputed and consists of clear admissions on the part of the parties prevailing at the trial; can read and evaluate documents and depositions as well as the trial court; and can draw conclusions from the evidence as well as can a trial court. So the cases hold; and that is the basic situation here involved.

We have, in the case at bar, one involving many admissions as to fundamental issues of fact, from the mouths of defendant witnesses; much undisputed evidence on established facts; much documentary and deposition evidence. Basically, the necessity for reversal of the lower court judgment can be shown from the admissions obtained from defendant witnesses themselves. While the evidence of plaintiff and his witnesses may help clarify the picture and place it in true perspective, it is in general principally a buttressing and support for the legal conclusions which may in any event be plainly drawn from the testimony of the defendants.

Under these circumstances, as will be shown in the following paragraphs of legal authority, this court has the capacity, the right and the duty to review with independent care, unbound by the trial court's views, the findings of the lower court.

(a) The Authorities Fully Support the View That Independent Review of the Findings in This Case Is Required.

Turning to a brief and far from exhaustive review of the cases, we find that the general principles of law above enunciated as to the freedom of the appellate court to review these findings are thoroughly supported by the general law and the cases in this court itself.

Thus, with regard to the drawing of conclusions from admitted facts, we may consider the Ninth Circuit case of *Home Indemnity Company of New York v. Standard Accident Insurance Company* (C. C. A. 9, 1948), 167 F. 2d 919, 930. Here a lower court finding that an insured driver made no false or misleading statements of fact in reporting an accident to his insurer was held clearly erroneous and reversed.

The driver admitted the making of certain statements. In concluding that reversal was required, this court stated in its opinion that the lower court:

“ . . . found . . . that the appellant ‘has not been in anywise prejudiced by any action or statement or omission of George White.’ This is a conclusion of law, or, at most, an inference from undisputed facts, which we are in as good a position to make as was the trial court.” (P. 930.)

That is the situation here also, where only a few of many major and crucial admissions of defendants are:

(a) The bringing to them of the Kinzua deal by plaintiff and his broker, Terman;

(b) The plaintiff's arranging a conference with the seller concerning possible sale of the property, and inviting O'Donnell and another defendant along, and their actual participation with plaintiff in the conference;

(c) That plaintiff was to raise in the east whatever he could of \$2,300,000 they could not raise in the west;

(d) That defendants proceeded with many exploratory steps toward purchase of Kinzua, even while professing to plaintiff their disinterest in the deal;

(e) Months before closing the deal, the defendants ceased to communicate with plaintiff;

(f) That defendant O'Donnell sent a letter (demonstrably false and misleading) of purported explanation to plaintiff after defendants had consummated the deal, leaving out plaintiff;

(g) The inference from the circumstances that there was a joint venture.

Similarly, in *Smith v. Royal Insurance Company* (C. C. A. 9, 1942), 125 F. 2d 222, reversal of a judgment, based on a trial court's finding that plaintiff did not have tenure of a building for its life, was deemed required by this court. Because of the nature of the evidence, documentary or undisputed (as is essentially the case also), this reviewing court felt the trial court's finding did not require to be given great weight. Judge Healy, speaking for the court, said at page 224:

"The bulk of the evidence bearing on the subject is of a documentary character or rests on circumstances concerning which there is no dispute. Accordingly, the finding of fact does not command the strong presumption of verity which usually attends a finding."

In *Gillette v. Commissioner* (C. A. 9, 1950), 182 F. 2d 1010, this court again reversed a lower court judgment on the basis that a finding (as to a gift's being made in *causa mortis*) was a mere conclusion, based on inference. Judge Stephens, speaking for the court, stated at page 1014 that the court in such a situation has “. . . the power (and we would suppose the duty) to draw such inferences as we deem proper.” The rule is stated that a finding is clearly erroneous where, even though there is evidence to support it, the reviewing court on the entire evidence is left with the definite conviction that an error has been made.

Turning to the law as stated in other circuits, we see that it is precisely the same. Thus, in *Koenig v. Oswald* (C. C. A. 8, 1936), 82 F. 2d 85, the appellate court reversed the findings of the lower court in a fraud case as against the weight of the evidence, even though they were actually sustained by the spoken word from the witness stand.

In *State Farm Mutual Auto. Ins. Co. v. Bonacci* (C. C. A. 8, 1940), 111 F. 2d 412, the court once again reversed a lower court ruling based on faulty fact findings. Heavy emphasis was placed on the contradictory statements and inconsistencies of the respondent's witnesses. The appellate court regarded respondent as “a successful businessman” who should be held to some responsibility to tell a consistent story, even though he was foreign born and did not attend school after the age of twelve.

Such an attitude may be compared with that of the trial court herein. In its opinion the trial court in the present case excuses O'Donnell's inconsistencies because he is “a lumber man, familiar with forests and the running of sawmills,” [Opinion, Tr. 4249], and regards his “inadequacies” as bolstering the value of his testi-

mony. (Actually, of course, O'Donnell is a Yale graduate [O'Donnell, Tr. 1411]; product of a Pennsylvania prep school [O'Donnell, Tr. 3396]; a resident of Seattle [O'Donnell, Tr. 1405]; an executive officer of a number of companies [O'Donnell, Tr. 1406-1407]; a member of the Seattle Golf Club [O'Donnell, Tr. 1407], and of a group called the "487" maintaining a larger suite of rooms at the Olympic Hotel in Seattle [Tr. 1408]. This is hardly the record of a man who is merely a bucolic woodsman, unfamiliar with words or city ways; and this is apparent from every measured, careful and evasive O'Donnell word spoken throughout his long testimony and deposition.)

With great appropriateness, the opinion in the *Bonacci* case states:

"If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses. In Simkins Federal Practice, 3d Ed., page 488, in commenting on the effect of Rule 52(a) it is said:

" 'The new practice . . . applies to all cases tried without a jury . . . and whether the finding is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony.

" 'Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full weight to the special qualification of the trial judge to pass on credibility.' "

An important United States Supreme Court case is that of *United States v. United States Gypsum Co.*, 333 U. S. 364, wherein the court states and holds, in reversing a lower court decision based, as here, on faulty findings, that:

“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

And in *Orvis v. Higgins* (C. A. 2), 180 F. 2d 537, cert. den. 340 U. S. 810, the appellate court, pointing out that evidence which might sustain a jury verdict may not suffice to support a trial court’s finding, states in its opinion:

“In the light of the Gypsum case, we may make approximate gradations as follows: * * * Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge’s finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge’s finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances.”

Other cases showing the freedom of the court on review to examine and overturn findings are:

Keller v. Potomac Electric Co., 261 U. S. 428; and *Kuhn v. Princess Lida of Thurn & Taxis* (C. C. A. 3, 1941), 119 F. 2d 704. (Incorrect conclusions by trial courts qualify as clearly erroneous findings, for the correction whereof by appeal Rule 52(a) specifically provides.)

Appellant in this brief will show that many basic findings of the lower court fly in the face of the undisputed evidence and defendants' admissions and the documentary evidence, and that other important findings underlying the judgment are really only conclusions, and conclusions directly contrary to facts.

Hence, in a true sense, the basic findings below, such as those concluding that no joint venture existed, are clearly erroneous and subject to reversal, under the rules stated and followed in the authoritative cases above cited.

III.

A Joint Venture, Both by the Evidence and by Implication of Law, Is Shown to Have Existed, and Any Contrary Finding Is Clearly Erroneous.

Despite all the arguments that will be advanced by defendants to the contrary, and despite limited denials by defendants, it is crystal clear that under the facts and the law a joint venture agreement was entered into between Joseph and O'Donnell for the purchase of Kinzua Lumber Company, with Joseph's and O'Donnell's group to raise approximately equal or equal sums for the purpose. The contrary findings are clearly erroneous [Finding V(5), Tr. 252-253; Finding XIII(1), Tr. 273; Conclusion III, Tr. 281].

This will now be briefly demonstrated by a review of the evidence and the admissions of the defendants themselves.

As previously discussed, Joseph admittedly and concededly brought word of the availability of Kinzua for purchase to O'Donnell and Chinn [Chinn, Tr. 802-803, 816; O'Donnell, Tr. 1602-1603].

Chinn met Terman and discussed Kinzua with him in Harry Joseph's office [Chinn, Tr. 859, 863-864]. Chinn and O'Donnell, some days later in Beverly Hills, called and personally conferred with Terman to find out what Terman knew of Kinzua [Chinn, Tr. 873].

Chinn himself testified that on the evening of October 24, 1952, he met with Joseph in Chicago and discussed the Kinzua stock with Joseph [Chinn, Tr. 816]. At that time Joseph showed him documentation relating to the Kinzua deal and giving considerable information about Kinzua [Chinn, Tr. 817].

Chinn then formed the idea that this was a pretty big outfit—something in the millions [Chinn, Tr. 818]. Joseph might have mentioned the acreage, but Chinn did not remember what was said in that regard [Chinn, Tr. 843].

Chinn asserts when he came to some of the figures involved, on November 19, 1952, he "got kind of cooled off." [Chinn, Tr. 844.] Nonetheless, that evening he went home and called his sister on the phone in Seattle [Chinn, Tr. 850] to ascertain the name and whereabouts of persons whom he believed were related to the owner or principal stockholders in Kinzua [Chinn, Tr. 850].

Calling them, Chinn was told that the person to talk to was Joe Coleman, the manager of Kinzua [Chinn, Tr. 852], who ". . . is the one that knows the whole story about Kinzua." [Chinn, Tr. 852-853.] Joseph then made this contact for Chinn and O'Donnell.

(It is important to remember throughout that, as is undenied [Joseph, Tr. 443], the Kinzua interests were only dealing with one prospective purchaser at a time. Therefore, since Joseph was the one who originally con-

tacted the Kinzua interests through Coleman, the opportunity to deal with them was peculiarly his, and O'Donnell in silently stealing it from him stole something which was unique and valuable, as well as being something entrusted to him as a converter, not for himself.)

Then Joseph (not O'Donnell or Chinn), concededly and admittedly, arranged with Coleman a meeting in Portland to discuss the Kinzua purchase [O'Donnell, Tr. 1611-1612]. To this he invited Chinn and O'Donnell.

And so it was that on November 18, 1952, Chinn and O'Donnell joined Joseph at the Old Heathman Hotel in Portland, where they registered together [Chinn, Tr. 894, 900].

They met together, in pursuit of a common interest and objective. They did not meet as strangers, for Joseph undisputedly had known Chinn for some twenty years [Chinn, Tr. 788-789], during which he had been engaged with him in numerous business deals. As a result of this long association, there was clearly a mutual trust and esteem. Chinn testified that he regarded Joseph as a man of honesty and as a business-like person of integrity [Chinn, Tr. 3227].

Too, Chinn and O'Donnell had known one another intimately, both as business associates and social friends, for a period of twenty years; they had been intimate friends for ten to twelve years [Chinn, Tr. 786-787]. Thus, when Joseph and O'Donnell met, they were introduced to each other and recommended to each other by Chinn, and did not deal as strangers, but as men whose integrity and standing had been vouched for by Chinn, whom they both trusted.

The assumption would be far-fetched that two experienced businessmen such as Joseph and O'Donnell would go to an important meeting, flying hundreds of miles to do so, and start negotiations with the authorized repre-

sentative of the sellers for purchase of a timber empire, without first having arrived at some understanding as to their relations as between themselves.

Evidentiarily, an extraordinary situation now develops, fatal to the credibility of Chinn and O'Donnell. Chinn and O'Donnell both testify that they can recall virtually nothing of the long afternoon and evening which they spent together [Chinn, Tr. 894, 901; O'Donnell, Tr. 1619].

Until confronted in depositions with the documentary evidence that they did in fact register along with Harry Joseph that evening, and did attend the University Club there with him, they coolly denied having met with him at all that evening.

When thus confronted, they calmly changed their stories, and admitted, of necessity, that they had in fact met with Joseph on that day as the documents showed, and spent a long evening with him.

Each of these defendants however, as though linked in some grotesque and highly improbable amnesia, calmly continued to deny any recollection of anything whatever that was said between these three intelligent and articulate people during the hours they spent together that evening [Chinn, Tr. 894, 901; O'Donnell, Tr. 1619]. "That was a long while ago," says O'Donnell calmly, though recalling in other portions of his testimony much which serves him, of equally ancient vintage.

This is characteristic of the testimony of defendants Chinn and O'Donnell throughout; they admit adverse things only when such admissions are forced upon them, regardless of the frequent grotesqueness of their testimony. The best that can be said by them of their testimony on this particular evening is simply that they felt they would have recalled it if there had been such discussion of the subject of a joint venture.

That there was conversation that evening is plain. That it must have borne a relationship to the only reason they came to Portland—to enter into negotiations for the purchase of Kinzua—is also plain. The denial of Chinn and O'Donnell is inherently incredible.

We have before this court the substantially uncontradicted testimony of one witness—Harry Joseph himself, whose integrity Chinn himself, over a period of many years, does not challenge. Joseph testifies that there was (as common sense tells us this is true) animated discussion on this subject that evening. Joseph tells us too what that conversation was. We now set it out.

First, while walking to the University Club for dinner, Joseph with characteristic integrity made it clear to O'Donnell that Terman had brought the deal to him, that it was to be kept confidential, and that Terman expected a five per cent commission [Joseph, Tr. 373]. O'Donnell regarded that as high,* and there was discussion

*O'Donnell in this case boasted grimly "I never paid a commission on a lumber deal" [O'Donnell, Tr. 3473]. This casts vivid light on the consistency of his pattern in trying to eliminate joint venturer Joseph, who stood firmly for paying Terman his commission.

Later in this deal he waged a sordid battle to freeze Kelleher out of a commission, although he had used him extensively in contacting Webster and whetting his interest in taking 50% of the Kinzua deal [O'Donnell, Tr. 1446-1448]. O'Donnell coldly threatened Kelleher with calling off the entire deal unless assured he and his group would have no commission liability to Kelleher [Exs. 62, 72 and 74].

He also did not hesitate to tell Kelleher, in an untruth admitted on trial, that he had tried to reach Webster directly before calling Kelleher [Ex. 74; O'Donnell Tr. 1436]. These brass knuckle tactics forced Kelleher to capitulate after a further battle summed up in Exhibits 79, 80-83, 85, 91, 101, and 105-110.

Kelleher commented of O'Donnell that ". . . his telegram to me was nothing short of blackmail" and that O'Donnell "has started chiseling on his deal with Webster" with regard to salaries, additional overrides, etc. [Ex. 108]. Shoemaker, tried to console Kelleher for O'Donnell's "shabby action," telling him that O'Donnell's chiseling tactics should solidify Kelleher's relationship with Webster [Ex. 109].

as to whether Terman would agree to take it partly or entirely in some other form than cash [Joseph, Tr. 373].

Then, at the club, Joseph told what he had learned from Terman about Kinzua [Joseph, Tr. 375], and the following conversation took place:

“O'Donnell said to me, he said, ‘Joseph, what do you have in mind on this deal?’ ‘Well,’ I said, ‘O'Donnell, Raleigh told me all about you, and he has implicit confidence in you, and he is associated with you, and I understand you have been very successful as an operator, and I am looking for someone that we can get into this thing that can handle this thing out here for me. I am not a sawmill operator, and if the deal looks all right to you and looks all right to ourselves, we will take a 50 per cent interest, and you fellows take a 50 per cent interest,’ and he said, ‘That is all right with me.’” [Joseph Tr. 373-374.]

That is the simple outline of the agreement. Not only is it believable in itself, and not only is it really undenied, but as we will see, it is consistent with the character and temperament of both Joseph and O'Donnell, and consistent with the actions of Joseph and O'Donnell in the months to come.

Then the meeting was held the next morning, November 19, 1952, with Coleman, in which an outline of the deal was concededly explored in some detail [Joseph, Tr. 377]. The others were to contact Coleman later, after thinking about it [Joseph, Tr. 379].

After the Coleman meeting, Joseph asked O'Donnell in a brief conference whether he should go back home and get started on the financing of the deal. O'Donnell told Joseph no, to let him, O'Donnell, handle it and that he would report back to Joseph [Joseph, Tr. 382].

Now, there we have the agreement so far as it required and at this Portland meeting received oral ex-

pression. It did not depend on the specific price or terms of Kinzua; but that is what business venturers normally face. When they enter into business, they do not know what vicissitudes or problems they will face; they only agree that they will face them together. That is what was done here.

In the trial court, defendants sought to make much of the asserted anomaly of two groups meeting and in one meeting agreeing, and orally agreeing, on the terms under which they would together venture. The trial court's opinion also adverts to this [Tr. 4257]. However, this is not only a common-sense thing to do, and very expectable, but it is *exactly* how O'Donnell himself boasted he completed the deal later with Webster.

For proof of this last statement, let us turn to the testimony of O'Donnell himself. He proudly states that when he met with Webster in Los Angeles on May 9, 1953, the whole meeting lasted an hour, or maybe not that long [O'Donnell, Tr. 1550]. Although O'Donnell had wanted control, he agreed in this first meeting with Webster to give Webster fifty per cent [O'Donnell, Tr. 1557]. "The whole deal was made in an hour's conversation or less, everything." [O'Donnell, Tr. 1558.] Not a scrap of paper was signed between them. Of course the problems of negotiating the terms of sale were not there resolved, and the fulfillment of the arrangement necessarily hinged on their mutual satisfaction with the terms that would be worked out with Kinzua's sellers.

O'Donnell then, avowedly did with Webster the very thing which his attorneys' profess to find so unlikely with Joseph. Unlikely? Not at all; it *happened*, so it is surely the kind of thing that was likely for O'Donnell.

Indeed, O'Donnell, having pursuant to such arrangement gone on and closed with the seller for a lower down payment than was originally discussed, comes forward

with a boast at the time of trial that he could not back away from his oral deal. Having entered into the oral arrangement with Webster for fifty per cent, he could not back away from it, even though the sellers suggested that by reducing the down payment O'Donnell and his group could take more than fifty per cent [O'Donnell, Tr. 1961-1962].

Also citing one relevant case, *Benton v. Blair* (C. A. 5, 1956), 228 F. 2d 55, 59, we observe that the court reversed a district court's dismissal under Rule 41(b), based on the district court's finding that there was no orally entered into joint venture. The court said in its opinion:

"We find nothing in the plaintiff's case here which renders suspicious or inherently improbable his assertions that an oral contract was made between the parties for an equal sharing of the profits of deals made by Blair with Benton's contracts . . . we cannot fairly say that there is anything inherently improbable in two businessmen, even on first acquaintance, making such an oral agreement, and relying on personal honor—or 'mutual trust and confidence,' as Benton so often put it—as the only sanction of enforcement."

Another factor reinforcing with great strength Joseph's basically uncontradicted version of the oral agreement of November 18, 1952 is the later actions and statements of O'Donnell.

For instance, O'Donnell throughout, as was manifested time after time, indicated that while his group desired operation control, they were not prepared to raise much if any more than half the money [O'Donnell, Tr. 1463, 1813, 3352].

The rest of the money would have to come from somewhere; no other genuinely available source than Joseph was seriously considered by O'Donnell outside of A. C. Allyn & Company, which Joseph himself brought in, and outside of the Webster interests which months later O'Donnell employed. O'Donnell must have considered, and did consider, that the rest of the money should come from Joseph.

He himself testified grudgingly that, as early as November 26, 1952, it was "quite possible" he had told his bankers in financing discussions that he "was going to take anything he could get out of Chicago." [O'Donnell, Tr. 1702.]

O'Donnell admits again and again that the Western group was to raise about one-half of the money, and that the rest was to come from Joseph. Thus, asked where was the two million three to come from, he replied, "Harry Joseph was to get whatever he could back east," [O'Donnell, Tr. 1813], and that we were going to get half the deal and going to get control of it. This implies another group; but O'Donnell does not seriously claim that any other group but Joseph was involved.

And yet again, O'Donnell admits that after Joseph found out what he could raise, he was to let O'Donnell know, and they would "probably have to work something out." [O'Donnell, Tr. 1735.] Continuing:

"Q. You would decide how much he could get?

A. Yes.

Q. You would decide? A. Oh no, I wouldn't decide. I didn't have any more right to decide than he had to decide . . ."

In O'Donnell's deposition, which is in evidence; and in an uncorrected passage, O'Donnell states, responding to a question as to how much money the Chicago group was to raise:

"A. Whatever we couldn't raise. . . .

Q. Well, on January 5, 1953, it was your understanding, then, that your agreement with Harry Joseph was that you and your group were to provide such financing as you could and that Harry Joseph was to provide whatever was left over? A. We didn't have any definite agreement with him. We merely said we would see what we could raise and what he could raise, and when it looked like the money was available the thing would be adjusted.

Q. You mean you would just start to raise as much as you could and after each side had done that, the O'Donnell group and the Joseph group, you would get together and allocate it, is that right? A. That is right." [O'Donnell, Tr. 3555.]

From such evidence, it is clear that, even aside from the explicit and virtually undenied testimony of Joseph as to the joint venture agreement, O'Donnell himself admits the agreement by saying, for instance, that "when it looked like the money was available the thing would be adjusted"; the O'Donnell group and the Joseph group were "to get together and allocate it." [O'Donnell, Tr. 3555.] Parties do not need to sit down and write lengthy documents labeled joint venture; if they say words and behave in a way which under the law constitutes them joint venturers, they become joint venturers. That is what was done here by O'Donnell's testimony—even apart from and beyond Joseph's virtually undenied testimony.

(a) To Show How the Parties Lived the Agreement as Well as Made It, Appellant Asks This Court to Incorporate, as Further Evidence of the Existence of a Joint Venture, the Sections Dealing With the Conduct of O'Donnell and Joseph, and Its Necessary Implication of the Existence of a Joint Venture Agreement.

With regard to the conduct and speech which imply the agreement, appellant asks that this court consider as further evidence of the venture which inescapably existed between O'Donnell and Joseph, the immediately following sections. These deal with the conduct of O'Donnell and Joseph, which conduct

(1) itself constitutes the substances as well as the most telling and inescapable evidence of the existence of such a joint venture agreement through the behavior of the parties; and

(2) itself renders incredible and indeed preposterous any attempted denial (even had there really been one) of the existence of the express agreement of November 18, 1952.

We urge that examination of the conduct of Joseph and O'Donnell, set out in these following sections, will readily show the court that the parties would never have behaved as they did had there not in fact been between them a joint venture agreement. Had there been no such agreement, the conduct of each would have been a gigantic riddle, a meaningless charade. Since there was in fact such an agreement, their conduct is readily explicable.

O'Donnell, from his conduct (up to the betrayal), plainly appears as one feeling reluctantly obliged to honor his obligations to his co-venturer whom he dares not yet thrust out of Joseph's own deal, and whose equity money he feels he may need. But how earnestly he wishes he could get rid of the Terman commission obligation which Joseph refuses to avoid!

Joseph appears as one who confidently, honorably and straightforwardly found both the deal (and later O'Donnell as a partner in it), raises the necessary money and continues to function in the situation in trust and good expectation, resting on his co-venturer's original agreement and later promise to report—and then is struck by a bombshell when from a trade paper he reads of his co-venturer's deceit.

From these positions—as assuredly not from the viewpoints taken by the trial court or defendants—the conduct of O'Donnell and Joseph makes good sense, and is perfectly explicable and rational.

IV.

Defendant O'Donnell's Conduct for Many Months After November 18, 1952, Inescapably Admits the Existence of the 50-50 Joint Venture of Joseph and O'Donnell to Negotiate the Kinzua Purchase.

The facts in this case, very many of them admitted, show that O'Donnell not only entered into a joint venture agreement with Joseph to negotiate for and acquire Kinzua; he also acted for many months in conformity with such an agreement having been entered into and continuing to exist.

Before November 18, 1952, and the Making of the Joseph-O'Donnell Agreement.

Of course, there is no possible doubt that O'Donnell and his group in the early stages followed Joseph's lead entirely. It was Joseph through Terman who ascertained the existence of the opportunity for purchase, undeniedly [Joseph, Tr. 325; Terman, Tr. 1161, 1171]. It was Joseph who met with Chinn in Chicago on October 15, 1952 [Pretrial Order, Tr. 155], and who admittedly told Chinn of the deal not later than October 24, 1952 [Joseph, Tr. 334-336; Chinn, Tr. 816, 859, 863-864].

Chinn relayed Joseph's and Terman's information on Kinzua to O'Donnell, who thus learned of the deal [Chinn, Tr. 839; O'Donnell, Tr. 841]. It was Terman who, after Chinn had told O'Donnell of Kinzua, spoke of it further to Chinn and O'Donnell at Chinn's request on November 6, 1952 [Chinn, Tr. 841, 873]. It was Joseph and Terman who undeniably arranged the meeting with the agent of the seller, Joseph Coleman [Joseph, Tr. 361; Terman, Tr. 1225-1226], which meeting was held on November 19, 1952. It was Joseph who called and advised Chinn of the meeting [Chinn, Tr. 878-879], and it was by agreement with Joseph that O'Donnell came to Portland [Chinn, Tr. 879] for the full and authentic word on Kinzua from Coleman.

As we discuss elsewhere, the complete blackout by O'Donnell and Chinn [Chinn, Tr. 901-902; O'Donnell, Tr. 1619-1620] as to the contents of the full evening's discussion of November 18, 1952, is monumentally unconvincing; Joseph is the only one who testifies as to the contents of the evening's conversation in so far as it relates to the joint purchase of Kinzua by Joseph and O'Donnell [Joseph, Tr. 373-374]. His testimony is clear and natural—that there was an agreement between Joseph and O'Donnell to negotiate for and acquire Kinzua jointly and equally.

After November 19, 1952, and the Making of the Joseph-O'Donnell Agreement.

One test of the existence of that agreement is the manner in which the parties dealt with regard to one another thereafter. This is what we will analyze; and it shows plainly that, no matter how reluctantly, O'Donnell conceded by his later conduct toward Joseph over a period of months that he and Joseph were bound up together in the deal for acquisition of Kinzua.

Of course O'Donnell, a West Coast man, was the man on the scene for the purchase of this west coast property. Now there was someone here to carry the ball on the West Coast aspect of the deal.

Joseph went home to Illinois and, as the testimony shows beyond the shadow of a doubt and without challenge, went home and spoke with wealthy and prominent people, issued a prospectus and got together the money required to make his half of the deal.

But O'Donnell, out on the West Coast, unfortunately for his position on this appeal, could not and did not ignore Joseph. For example, he knew he had to, and he did, provide the information to Joseph so that he could raise his money in Chicago for the deal. On or about December 5, 1952, as Dunn, O'Donnell's attorney, himself testified, O'Donnell told Dunn he'd talked to Joseph and Joseph "wanted some ammunition to try to interest people in Chicago in the possible purchase of Kinzua" [Dunn, Tr. 1009-1010]. Obedient to O'Donnell's requirements and Joseph's, Dunn called Casey, a Kinzua attorney, to fill out the corporate picture of Kinzua [Dunn, Tr. 1011].

Then, still early in December, 1952, Dunn called Joseph and gave him a great deal of information about the method of Kinzua's acquisition plan, as directed by O'Donnell [Dunn, Tr. 1010; O'Donnell, Tr. 1710-1711].

Dunn admits he understood in this call that Joseph was going to try to interest Chicago investors and perhaps make some investment himself [Dunn, Tr. 1066] (though he says he did not believe Joseph's investment would be large).

Joseph, in preparing his prospectus for his group [Ex. 381], stated therein that the Seattle group had agreed to take 50% or three million dollars of the necessary

equity money, and that it would be necessary for the Chicago group similarly to raise three million dollars. (Some few days later, advised by O'Donnell that he was going to drop out of the deal, Joseph revised the prospectus given to certain investors [Ex. 391] and deleted the statement as to the Seattle and Chicago groups each raising three million dollars [Joseph, Tr. 462].) This prospectus was a contemporaneous document, and it is interesting and significant to note Joseph's statement therein, for the benefit of his investors, taking the same position that he has taken throughout the lawsuit—that O'Donnell and his group were to have 50% and Joseph and the Chicago group were to have 50% [Ex. 381].

O'Donnell, who was very wary of anything in writing in this deal, has virtually no memoranda; but, as discussed elsewhere in this brief, the documents of Terman and Joseph, such as the prospectus itself, are consistent with plaintiff's position and reinforce it.

We turn back to the question of the O'Donnell-Joseph relationship. Joseph testifies that there were many conversations with O'Donnell in December—about O'Donnell's arranging to go to the woods [Joseph, Tr. 432]; about whether Joseph would take less than 50% (he wouldn't) [Joseph, Tr. 433]; about whether they would have to pay the 5 per cent commission to Terman [Joseph, Tr. 434], and so on.

O'Donnell himself testifies he'd called Joseph in Chicago around December 5, and told Joseph he'd been down to Portland on the Kinzua transaction [O'Donnell, Tr. 1681]. O'Donnell, who denied this on deposition, now admits it because his phone bills show the call [O'Donnell, Tr. 1681].

The same phone bills force O'Donnell to admissions that there were two more phone calls to Joseph in Chicago on

December 11, 1952 [O'Donnell, Tr. 1742], discussing the financing.

O'Donnell states he told Joseph of the meeting with the bankers to impress the Colemans "that we were able, the kind of people that they were looking for to buy the plant . . ." and that there was a discussion of a joint loan of six million dollars by three banks [O'Donnell, Tr. 1743]. He told Joseph: ". . . if they were talking at least about a 6 million dollar loan, why that timber had some value and it was something for him to use as ammunition to raise some money." [O'Donnell, Tr. 1743]. He also told Joseph that "we," presumably some of the Western investors, had kind of agreed they would probably invest half a million dollars apiece if the deal was all right and finally developed [O'Donnell, Tr. 1744].

O'Donnell also told Joseph that Coleman had waived a previous \$600,000 deposit requirement, and that he was taking Mr. Kesterson in "and we had in mind to manage it." [O'Donnell, Tr. 1745.] The furnishing of such interim reports is not the kind of thing that is done for an outsider.

Elsewhere in this brief we discuss the total insincerity of O'Donnell when on December 19, 1952, he called Joseph [Pretrial Order Stipulation, Tr. 157] and told him he was out of Kinzua. In the present context we comment merely on the fact that O'Donnell spoke to Joseph, admittedly, about his supposed decision on the very day it was supposedly made and gave a "report on the property," and "a general report on the mill too." [O'Donnell, Tr. 1785-1786.]

The obligation to provide some explanation to Joseph for O'Donnell's extraordinary "drop-out" seems to have been felt quite strongly by O'Donnell; once again, this is not what he would have done for an outsider, or anyone who was not a substantial part of the deal.

It should be noted too that O'Donnell, asked where the rest of the money for Kinzua was to come from, conceded that "Harry Joseph was to get whatever he could back east" [O'Donnell, Tr. 1813], and offered no other explanation of where he was going to get the money. At this point O'Donnell did not have, or dare to assert that he had, any other source than Joseph for the other needed half of the deal.

O'Donnell admits too that around November 26, 1952, it was "quite possible" he'd told his bankers he was going to "take anything he could out of Chicago." [O'Donnell, Tr. 1702.] These, and other statements discussed elsewhere in this brief, make it clear that O'Donnell leaned on Joseph for the money required over the one-half that O'Donnell's group intended to raise [O'Donnell, Tr. 1735, 3555, etc.]. This again is of course evidence that the parties in fact acted in strict accordance with their being a joint venture, involving the raising by them of the necessary money.

Then, between December 31, 1952 and January 5, 1953 [Pretrial Order Stipulations, Tr. 158]. O'Donnell again called Joseph and discussed the interest displayed by A. C. Allyn & Company, through Marshall [Pretrial Order Stipulations, Tr. 158]. O'Donnell again tried to ease Joseph out of telling him he was very lukewarm on the deal, but that he could raise two and a half million [O'Donnell, Tr. 1810-1811]. It is interesting to note that he did not dare to claim he could raise all the money, and that he kept discussing with Joseph the raising of money.

Also, while as we elsewhere show it is entirely untrue that Joseph said he was with the Allyn group, it is significant to note that O'Donnell felt himself compelled so to testify [O'Donnell, Tr. 1811]; for the clear fact is that he dared not say—now or ever—that he desired to throw

Joseph out. By the device of falsely claiming Joseph's alignment with the Allyn group, O'Donnell still finds himself *admitting* that Joseph was in the deal; this is not a denial of Joseph's being a part of the deal, but only a shuffling of him to one side where he tried to dispose of him later. Joseph, in other words, O'Donnell in effect still concedes, was in the deal, only with another group.

And indeed O'Donnell admits in his deposition [O'Donnell, Tr. 3555], that on January 5, 1953, *after* the alleged O'Donnell drop-out, his group "would see what we could raise and what he (Joseph) could raise, and when it looked like the money was available the thing would be adjusted," though he does deny the existence of a "definite" agreement.

O'Donnell, who denied in his deposition *any* February conversation with Joseph [O'Donnell, Tr. 1823], admitted such a conversation on the trial, once again after being forced into it by the records [O'Donnell, Tr. 1823]. Confronted by the evidence that Joseph wrote to him on February 27, 1953 [Ex. 52], and commented on the call, as well as on "operations such as we talked about on the phone," O'Donnell was compelled to testify thus. The call was made from the office of Donover Company, O'Donnell's family corporation in Beverly Hills [O'Donnell, Tr. 1824]. O'Donnell told Joseph he was going to meet Coleman and ask him to put a man in to look at the Kinzua timber [O'Donnell, Tr. 1825].

Joseph's testimony fills in further interesting and significant details; he knew, as was true, that Joe Coleman's brother had called O'Donnell to arrange the meeting [Joseph, Tr. 454], and he remembered a discussion with O'Donnell of a management fee requested by O'Donnell [Joseph, Tr. 455-456]. O'Donnell does not even deny this conversation, but states with customary evasiveness that he cannot remember the conversation [O'Donnell,

Tr. 1825]. Once again we find O'Donnell dealing with Joseph as a part of the deal.

The parties understood that nothing could be finally done till the lumber had been inspected; it was winter, when snow prevented inspection. The next and, as it happened, final contact between Joseph and O'Donnell, before O'Donnell secretly dealt without Joseph, came on March 31, 1953 [Pretrial Order Stipulations, Tr. 158]. Just before it, O'Donnell states, he received and discussed with Marshall and Dunn an optimistic and favorable report from Price, the expert lumberman, to the effect that the timber had been looked at, that the quality was good and that the volume was probably as represented by Coleman [O'Donnell, Tr. 1836-1837, 1839-1840; Dunn, Tr. 1035-1036].

Then O'Donnell called Joseph, admitted he had a good report from Price, and would look the thing over [O'Donnell, Tr. 1840-1845]. O'Donnell states that he again asked if Joseph was with the Allyn group (again showing that he felt bound to fit Joseph in), and says that Joseph told him he was with Allyn, would be right along with them and that O'Donnell should do his business with Marshall [O'Donnell, Tr. 1841]. Untrue as this statement by O'Donnell is, it shows yet again that an obligation was owed to Joseph, and that he was definitely supposed to fit into the deal as an investor.

Unbelievably, O'Donnell says there was to be further examination, but that no report back was discussed [O'Donnell, Tr. 1841].

Joseph testified that in this conversation O'Donnell told him he was trying to get hold of a fellow named Price, formerly with Walker and Weyerhauser, to inspect Kinzua and arrange a cruise [Joseph, Tr. 464-465]. Also, O'Donnell was to report back when the cruise was complete [Joseph, Tr. 467]. Joseph's recollection in this

regard is documented by his memorandum [Ex. 57], which indicates that Joseph noted that O'Donnell then said that Price, of Walker and Weyerhauser, was to go to the Kinzua property and O'Donnell would report later.

In cross-examination, defense sought to make much of the fact that the memo at one place bore the date "3/10/53," and that on deposition Joseph, relying on that note, thus dated the call [Joseph, Tr. 2507], though O'Donnell would not on that date have been in Seattle [Joseph, Tr. 603, *et seq.*]. However, Joseph indicated even on deposition that his reason for thinking that was the date was the date notation on the corner of the memo [Tr. 2507], rather than independent recollection.

Since admittedly there was in fact a conversation—and only one—between Joseph and O'Donnell in March 1953, its inadvertent misdating by Joseph is of transcendently slight importance. It is also quite possible the date referred to one mentioned by O'Donnell in the conversation. Significantly too, Joseph on August 27, 1953, wrote to Terman and said, long before suit, that:

"The last time I talked with you, you will remember, my last conversation with O'Donnell was that he was waiting for a Mr. Price, who, at one time or another, was part of the Weyerhauser & Walker interests, to come to Seattle and then go down to the mill and go over the standing timber of the Kinzua Pine Mills." [Ex. 87.]

It should be noted in considering the testimony on this conversation that this call of March 31, 1953, was made at a time when O'Donnell, by his own testimony, had made no decision to purchase Kinzua. He testified himself that that determination was not made until about April 15, 1953, some five days after he and Stuchell had examined the properties themselves [O'Donnell, Tr. 1553].

O'Donnell, perhaps not realizing the tremendous import of his testimony, admitted that he told Joseph that he was planning further investigation [O'Donnell, Tr. 1841], and meant by that the cruise made in June of 1953 by Henry Thomas [O'Donnell, Tr. 1842], "plus a lot of investigation on our personal part" [O'Donnell, Tr. 1844], of the whole deal.

On this state of admissions by O'Donnell as to the plan for investigations and his advising Joseph of the plan, it is fantastic to believe that the matter was left on March 31, 1953, so that Joseph had no right to believe that a further report should and would come to him from O'Donnell.

Now however O'Donnell went on to break the faith. Pushing Joseph out of Joseph's own deal, O'Donnell went ahead and made a deal; now, and now only, did he openly act in relationship to Joseph in any way that would negate the existence of a joint venture. Even now, the way in which he replied later when Joseph queried him as to what had happened, was interestingly equivocal.

In O'Donnell's damningly untruthful letter of September 22, 1953 [Ex. 93], he states:

"When your group told me that they had lost interest in the Kinzua deal because of other utility deals, et cetera, that they had been interested in, I more or less dropped the matter and it lay dormant for a couple of months."

Once again, we see O'Donnell admitting Joseph had been a participant, but trying to shove him off as being part of Allyn and then saying *Allyn* had lost interest. (This would not explain why O'Donnell did not get back to Joseph with some report on the timber and on Allyn's supposed drop-out, but there are limits to how much explaining O'Donnell or anyone would be able to do in the face of the facts.)

Also, in stating to Joseph [O'Donnell, Tr. 1906], though admittedly untruthfully, that he let the matter lay dormant after the group that O'Donnell urged was Joseph's dropped out, O'Donnell once again concedes that the envisaged relationship between himself and Joseph was one which was very important to the deal; so important that without him the deal fizzled, and allegedly nothing whatever was done for months, and that then it was an unplanned accident that O'Donnell happened to run into some other person who could make the deal work out.

Thus, at this final moment as throughout, we find O'Donnell's conduct admits Joseph had been his co-venturer.

V.

Joseph, Despite the Findings of the Trial Court, Which Are Clearly Erroneous, at All Times Intended to, Worked to, and Was Prepared, Ready and Able to, Participate Equally With O'Donnell's Group in the Purchase of Kinzua Lumber Company, and These Facts Were Well Known to Defendants.

The findings of the trial court fly directly in the face of the evidence with respect to the question of Harry Joseph's intentions, efforts and ability to participate equally with O'Donnell's group in the Kinzua purchase, and with regard to the knowledge by defendants of these facts, the findings, some of which will be set out in brief summary fashion, are clearly erroneous to the extent that they purport to deny Joseph's intentions, efforts and ability to participate in the Kinzua purchase.

Generally, the findings attempt to paint the picture of a situation in which Joseph knew very little about the Kinzua deal, made no arrangements with O'Donnell or Chinn about it, and regarded both the important Port-

land meetings and subsequent discussions as being merely exploratory, with no one bound to any course of action or conduct. But the facts are entirely contrary.

Thus, in its opinion (blanketed in, in its entirety, in the findings [II, Tr. 247]), the court urges that at the time of the Portland meetings of November 18th and 19, 1952, Joseph did not know much about the Kinzua properties or the basis of their possible purchase, and that particularly, as to Joseph:

“Joseph didn’t know much about it. All he knew was that Terman said Kinzua was for sale. That is all. There is very little more that Joseph knew about it.” [Opinion, Tr. 4256.]

The trial court also finds that the information the parties had even after November 19, 1952, was insufficient to determine if purchase of Kinzua stock was feasible [Finding V(4), Tr. 252], and that neither party ever intended to become or did become the agent of the other in any respect, or entered into any understanding with any of the others [Finding V(5), Tr. 252-253]. *All* discussions were “exploratory” only, and there was no meeting of the minds nor was anyone bound expressly or by implication to any course of action or conduct [Finding V(5), Tr. 253]. Joseph never indicated he would invest any money or that anyone might invest in Kinzua [Finding VIII(6), Tr. 261].

The conclusions of law are that there was no joint venture; there was no relationship between O’Donnell and Joseph, and if there was any it was terminated by March 31, 1953; if it was not terminated defendant O’Donnell believed reasonably that the relationship ceased to exist [Conclusions, III, Tr. 280; Conclusions, VIII, Tr. 281].

The findings do not bother to say a word, pro or con, regarding the result of Joseph's earnest and successful efforts to get together large amounts of financing in Chicago.

The findings then, in summary, paint a picture of a know-nothing, do-nothing, say-nothing plaintiff who is in glaring contrast with the real-life Harry Joseph whose activities are portrayed, often documentarily, or undeniably, in the pages of this transcript. This is the Joseph some of whose actual words and actions we will briefly summarize in this section, in showing how extraordinarily erroneous are the findings and conclusions of the trial court.

This Harry Joseph is owner of a prominent Chicago lumber company, and a man of honor and public service in the community.* He has been the director of several banks, was appointed by the Comptroller of the United States to liquidate over twenty national banks, which assignment he completed, and has served Chicago as President of the West Chicago Park Board and a Vice-President of the Chicago Park Board and is presently a member of the Community Conservation Board of Chicago [Joseph, Tr. 316-319].

(a) Admittedly, Joseph Found the Kinzua Deal and Made It Known to O'Donnell and His Group.

That Joseph and Terman found the Kinzua deal, and that it first became known to Chinn and O'Donnell through their efforts, is not even denied, but on the con-

*We offer as a character witness for plaintiff, to assist the court in evaluating this matter, Raleigh Chinn himself, who though a defendant himself, felt forced to concede, based on a business intimacy of twenty years, that ". . . as far as I know, he never made me feel that his integrity wasn't all right." [Chinn, Tr. 3227.]

trary is explicitly admitted [Chinn, Tr. 802-803, 816, 839; O'Donnell, Tr. 1602], and is dealt with at somewhat greater length in another section of this brief.

(b) Joseph and Terman Seriously Sought to Get Information and Make Necessary Contracts Re the Kinzua Purchase Even Before O'Donnell Was in the Picture.

Joseph and Terman strove at all times to clear the road for the purchase by Joseph and O'Donnell.

It should be noted that there was unquestionably earnest and serious activity on the part of Terman, for Joseph, directed toward the Kinzua purchase, even before the parties ever went up to their important meeting in Portland. As early as September 26, 1952, following considerable prior activity, Terman wrote a significant letter [Ex. 11] to Joseph Coleman of the Kinzua Lumber Company. He stated that the subject of his letter was the possible purchase of the stock of Kinzua, and that:

“I represent Mr. Harry Joseph, President of the Joseph Lumber Co. of Chicago, who had indicated to me, interest in acquiring your Company.”

He urged that Mr. Joseph and his associates were men of integrity and responsibility, who would qualify in every way for such an undertaking. He asked that a meeting be arranged.

This letter shows how energetic, genuine and early was the interest of Joseph in the Kinzua purchase—long before O'Donnell could have been a factor. Terman also wrote to Joseph [Ex. 12], enclosing a copy of the letter to Coleman.

A few days later, Joe Coleman wrote back to Mr. Needleman, the Beverly Hills lawyer for a large Kinzua stockholder, and himself a Kinzua director, noting the

Terman inquiry and stating that he would let Needleman know in the future about the reaction to Terman's approach [Ex. 14]. Ultimately of course this approach ripened into the November 19, 1952, meeting.

With regard to information obtained by Joseph and Terman, we can briefly point out that Chinn himself says that on October 24, 1952, Joseph showed him a letter of a couple of pages about the deal, and a separate sheet showing "a rough draft of a company's condition in figures" relating to Kinzua, not a complete balance sheet, "and in looking over the figures I remembered that I formed an idea that 'Well, it is a pretty big outfit,' something in the millions" (though perhaps not more than three or four millions) [Chinn, Tr. 817-818].

Joseph also testifies that at this meeting he had the Kinzua 25th anniversary brochure, showed it to Chinn and reviewed with Chinn the acreage, how much lumber, where it was located, the existence of a railroad, planing mill, hospital, school, etc. [Joseph, Tr. 346]. He also discussed the 50-50 interest that Joseph and O'Donnell were to take, both at this meeting and on the earlier one on October 15 [Joseph, Tr. 347].

It was Joseph who, on November 7, 1952, called Coleman back [Ex. 20], got information about Kinzua (including the price, though O'Donnell denies this as to price, saying that the price came as a surprise to Joseph at the November 19 meeting), and admittedly set up the meeting in Portland, including permission to bring Chinn and O'Donnell along [Joseph, Tr. 354-360].

Coleman had already been interested in Joseph as a possible purchaser by Terman's efforts with the Gold & Needleman firm, and by Terman's letter to Coleman about Harry Joseph being a prospective purchaser of integrity

and ability [Exs. 11-15; Needleman, Tr. 2719, 2728, 2736, etc.].

We will not go again through the actual meeting in Portland of November 18 and 19, 1952, other than to comment that admittedly Joseph attended with Chinn and O'Donnell, and that admittedly the deal was explained at the meeting by Casey, the attorney for Kinzua, along with the price [Chinn, Tr. 915; O'Donnell, Tr. 1632-1636].

Admittedly too O'Donnell stated that the price might not be bad if the sellers had as much assets and timber as they said they had [O'Donnell, Tr. 1644]. (In this connection it should be noted that O'Donnell admits that it was not until the following June that a cruise was taken which could determine that Kinzua owned the timber that was represented to exist) [O'Donnell, Tr. 1570]. We omit here detailed discussion of the difference between O'Donnell and Joseph as to what was said after the meeting; but even O'Donnell admits that Joseph said some of his Chicago friends might be interested, and admits he himself always thought at this time that Joseph did want to make some investment [O'Donnell, Tr. 1644, 1649].

Now Joseph once again set up another meeting for O'Donnell so that the deal should not lag. On November 29, 1952, Joseph called O'Donnell while Joseph was with Needleman, Gold, Terman and Coleman at Needleman's office [Joseph, Tr. 394]. Coleman in that call suggested O'Donnell meet with him the following week [O'Donnell, Tr. 1677]. That meeting was held, with Casey and Chinn and two of the Wymans, and the matter was reviewed again [O'Donnell, Tr. 1679; Chinn, Tr. 953-954].

(c) Later Contracts by Joseph With O'Donnell Show His Continued Interest and Intent to Participate in Kinzua.

Now, it should be remembered, O'Donnell, the West Coast lumberman, was the person to carry the Kinzua deal forward for himself and Joseph. This is the pattern that events took; but it is interesting to note that O'Donnell, for all his half-denials of the existence of a joint venture, kept calling and remaining in some kind of contact with Joseph. Joseph, on the other hand, certainly did all that could be expected of him in remaining in contact with O'Donnell.

Thus, on December 5, 1952, O'Donnell admittedly called Joseph in Chicago and told him he'd been in Portland on the Kinzua transaction [O'Donnell, Tr. 1681].

On December 10, 1952 [Ex. 39], Joseph wired O'Donnell stating he'd called again today, learned he was in Portland, would be back the next day, and asked him to call. On the 11th, O'Donnell did call [Ex. 40], with information about the possible bank loans from the Seattle and Portland and other banks [Joseph, Tr. 405]. It "was something for him to use as ammunition to raise some money" [O'Donnell, Tr. 1743].

Around December 5 to 10, 1952, Dunn called Joseph at O'Donnell's behest and gave him requested information regarding Kinzua and the proposed acquisition plan [Dunn, Tr. 1010-1026]. Dunn well understood that Joseph was to try to interest Chicago investors and perhaps to participate himself [Dunn, Tr. 1066]. Around December 16, 1952, Joseph wired Terman to have Needleman send ten Kinzua brochures [Ex. 41].

On December 19, 1952, O'Donnell and Joseph spoke again by telephone [O'Donnell, Tr. 1784-1785]. Accord-

ing to O'Donnell, he then said he was getting out of the Kinzua deal; Joseph says only that O'Donnell said Kester-son was not enthusiastic and that "we ought to let the matter rest for a period of about sixty days" [Joseph, Tr. 436]. Joseph wrote a memo on December 22 concerning this call [Ex. 386].

Joseph displayed continued interest. He at once called Coleman to find out what had happened [Joseph, Tr. 439], and spoke again to him around December 26 [Joseph, Tr. 442; Ex. 393]. He got Coleman's okay to "take this up with A. C. Allyn & Company" [Joseph, Tr. 444]. He also wanted to check the Kinzua lumber, so ordered a carload of it through Coleman [Joseph, Tr. 447; Ex. 45].

He then talked to Allyn and showed him a Kinzua brochure and the prospectus he had prepared. Allyn promised to check the matter out to see if they'd be interested in looking at the deal [Joseph, Tr. 450; Allyn, Tr. 2871-2874]. (Incidentally, Allyn denied that Joseph spoke to him to have Joseph be part of any Allyn "group" in the deal [Allyn, Tr. 2874].)

January 5, 1953, Joseph was in contact again with O'Donnell, who called about Marshall's interest on behalf of A. C. Allyn [Joseph, Tr. 452].

Later there was another call between Joseph and O'Donnell in Los Angeles, during January [Joseph, Tr. 453].

And on February 26, 1953, O'Donnell called Joseph from Palm Springs stating that he was to meet Coleman and talk further about Kinzua [Joseph, Tr. 453-454; O'Donnell, Tr. 1821-1824]. (O'Donnell's admission of the making of this call was grudging, but unmistakable.)

O'Donnell, according to Joseph, spoke of a management fee for himself [Joseph, Tr. 456].

Encouraged by this call, Joseph now sat down and wrote a letter of February 27, 1953 [Ex. 52], expressing pleasure that O'Donnell felt better and had discussed this operation on the phone.

He also wrote to Terman on the same day [Ex. 122], discussing the O'Donnell call and the discussion of O'Donnell's management of the deal, and the proposed Coleman conference. This contemporary letter to Terman speaks volumes as to the absolute truth of Joseph's consistent contention that O'Donnell then actively discussed management with him and asked him, as equal to equal, whether he would be amenable to O'Donnell's having a management fee.

On March 3, 1953, Joseph wrote again to Terman and told him of Allyn contacts [Ex. 55].

Once again, on March 31, 1953, O'Donnell and Joseph spoke on the telephone. Even on O'Donnell's own version, he said: “. . . we were going to go ahead and look the thing over” [O'Donnell, Tr. 1841]. He urges that Joseph told him to “do your business with Marshall” [O'Donnell, Tr. 1841]. O'Donnell does *not* claim he stated that he had completed investigations; he does *not* claim Joseph stated he would be out of the deal if Marshall and Allyn weren't interested. Even on O'Donnell's version of the call, the necessity for checking back with Joseph when he had gone ahead and looked the deal over is apparent. Joseph, of course, much more credibly states that O'Donnell told him he would check back after getting a cruise and a report on that cruise [Joseph, Tr. 464-466].

Admittedly, the cruise had not been made at the time of this call and was not made until at least June [O'Donnell, Tr. 1570; Findings of Fact XI(1), Tr. 268]. Balance sheets of Kinzua had not been provided yet either, and were not provided until April 21, 1953, by O'Donnell's own testimony [O'Donnell, Tr. 1853]. Joseph's continuing activity and interest and the need for further checking after March 31, 1953, stands admitted by O'Donnell. How then could the conclusion of the court [Conclusions of Law VIII, Tr. 281] that the relationship was terminated by March 31, 1953, or that defendant O'Donnell at least had reason to believe it ceased to exist—how then can such a conclusion and a judgment resting thereon be supported? The answer is that it cannot possibly be supported and is plainly erroneous.

It was O'Donnell's plain duty to get back to Joseph after March 31, 1953, and give him the opportunity to put up the money which he had raised in Chicago. The argument of respondents must basically be that Joseph should, after this conversation, have continued to initiate calls to O'Donnell, and that failing this it served him right that he was shut out of the deal is no argument at all—it amounts simply to saying that Joseph was too honest, believed that O'Donnell would go through with the joint venture agreement to purchase Kinzua with Joseph, and consequently was an easy mark who deserved to be cheated. Such an argument pushes every principle of fair dealing and fiduciary to one side and renders them of no account.

(d) Joseph Undeniedly Raised, and Still Has Available, All the Financing Required to Fulfill His Portion of the Agreement to Purchase Kinzua.

Harry Joseph on his part undeniedly secured adequate financing for his portion of the Kinzua deal. He got out his Kinzua prospectus [Ex. 383] from information obtained at Portland earlier, and from the Dunn call in December. He secured Kinzua brochures, made necessary amendments in his prospectus [Ex. 393] and, working from these documents and his own excellent reputation and acquaintanceship with friendship with prominent and wealthy Chicago businessmen, went out and secured all necessary financing, some previous to and some following the November meetings with Chinn, O'Donnell and Coleman.

Joseph was prepared to invest \$250,000 personally, and the same through Joseph Lumber Company [Joseph, Tr. 483, 695]. Harris Perlstein, President of Pabst Blue Ribbon Beer, agreed to invest \$250,000 in the Kinzua deal [Joseph, Tr. 354-355]. Perlstein himself testified to this effect on deposition [Perlstein, Tr. 4198-4200] and to his own ability to make such an investment, his confidence in Joseph, and his knowing him quite well for thirty to forty years.

Isadore Brown, a Master in Chancery in Chicago, agreed to invest \$250,000 [Joseph, Tr. 2359-2361]. Joseph had known Isadore Brown for thirty years and had real estate transactions with him [Joseph, Tr. 2361].

Milton A. Morris, a substantial corporate executive and real estate investor [Morris, Tr. 4171], testified that he had known Harry Joseph for thirty years, in a close social and business association, and that in June and November of 1952 he discussed Kinzua with Joseph

[Morris, Tr. 4172]. He agreed to participate in the Kinzua investment to the extent of \$250,000 [Morris, Tr. 4173].

Henry Russell Platt, a former vice-president of the Continental Illinois National Bank and Trust Company of Chicago, the sixth or seventh largest bank in the country [Platt, Tr. 4206-4207], discussed Kinzua with Joseph and agreed to invest \$250,000, or what was necessary [Platt, Tr. 4214]. Platt would have relied on Joseph [Platt, Tr. 4217], and stated he could additionally raise a very substantial portion of Joseph's requirements on the deal [Platt, Tr. 4215].

Abraham Pritzker, an attorney in Chicago and a member of the firm of Pritzker, Pritzker & Clinton, attorneys for plaintiff in this case [Joseph, Tr. 2346], discussed Kinzua with Joseph about two weeks before the Portland meeting of November 18 and 19, 1952 [Joseph, Tr. 2347]. Pritzker told Joseph that if it looked good to Joseph, Joseph could count on Pritzker for an investment of a million dollars or possibly more [Joseph, Tr. 2346]. Joseph had known Abe Pritzker's father and him for thirty-five years [Joseph, Tr. 2348].

William J. Lancaster, a Chicago attorney knows Joseph well for twenty or more years [Lancaster, Tr. 4228-4229] and had made a number of investments with Joseph [Lancaster, Tr. 4231-4232], discussed Kinzua with Joseph in the latter part of 1952 and made a firm commitment with Joseph to invest at least \$50,000 in the venture [Lancaster, Tr. 4229-4231]. Lancaster relied on Joseph and had implicit faith in him and his integrity and business ability [Tr. 4332].

Sol A. Hoffman, a Chicago attorney who had known Joseph for at least twenty-five years [Hoffman, Tr.

1101], discussed Kinzua with Joseph in November of 1952 [Hoffman, Tr. 1101], and firmly and definitely committed himself to invest \$250,000, upon the judgment of Joseph [Hoffman, Tr. 1107].

David S. Chesrow, an attorney, real estate investor and director of the Consumers National Bank of Chicago, knew Joseph for twenty to thirty years, and knew him very well [Chesrow, Tr. 1507]. In 1952 he discussed Kinzua with Joseph and agreed to invest to the extent of \$250,000 [Chesrow, Tr. 1508]. Like others of the investors, he testified to having seen the prospectus which Joseph got up [Ex. 381]. He relied on Joseph's knowledge [Chesrow, Tr. 1519].

Plainly, Joseph fulfilled all his duties as to financing, and did so through responsible and honorable fellow investors who held him in high esteem.

* * *

In summary, Joseph:

(1) Admittedly located the Kinzua deal through Terman;

(2) Admittedly made the initial contacts with the sellers and set up the first meetings with them;

(3) Continued contact throughout on all phases with O'Donnell, and was treated by O'Donnell as an equal in the deal on such contacts;

(4) Raised all the money necessary, and more, to invest for his group's one-half of the Kinzua deal.

Joseph did everything required of him, acted at all times in accordance with the contractual arrangements he had made with O'Donnell, and is entitled to the benefit of his venture. Any findings or judgment to the contrary is clearly erroneous and unsupported by credible evidence.

O'Donnell Explains to Joseph — FALSELY

H. J. O'DONNELL
400 SKINNER BUILDING
SEATTLE, WASHINGTON

September 22, 1953

Mr. Harry Joseph,
One North LaSalle Street,
Chicago 2, Illinois.

Dear Harry:

Please excuse my delay in answering your letter of August 31st. I have been out of town most of the time since the first of the month, and I am just getting around to catching up on some of my correspondence.

When your group told me that they had lost interest in the Kinzua deal because of other utility deals, et cetera, that they had been interested in, I more or less dropped the matter and it lay dormant for a couple of months. Later on I ran into a fellow from Montreal whom I had been engaged in business with in the Elk Timber Company in Canada some years ago. I started talking to him about the deal and he expressed a desire to know more about it. He is a man of very large interests and was in a position to put up a good deal of cash. I then reinstituted negotiations with Coleman and 'low and behold' we made a deal.

The way the lumber market has been behaving recently, I am not too sure we couldn't have made a mistake; however, time will tell.

FALSE:

A.C. Allyn and Company was never Joseph's group, as proven in many ways. Allyn and Joseph so testified (Tr. 2869, 450). O'Donnell on April 21, 1953 told Marshall, Allyn's representative, that Joseph's interest was that of a "small investor" (Tr. 1853). Marshall didn't even know who Joseph was. O'Donnell reported directly to Joseph even after Marshall began to investigate the deal (Tr. 1823-5, 1841).

FALSE:

O'Donnell admits that Marshall only told him A.C. Allyn was working on some other deal, and was forced to drop out for four to six weeks. (O'Donnell, Tr. 1449, 1443). O'Donnell in this very letter, asserts he held the matter in abeyance longer than "four to six weeks."

FALSE:

O'Donnell himself admits under cross-examination that this was "inaccurate." (O'Donnell, Tr. 1906).

FALSE:

The day after A.C. Allyn indicated on April 27, 1953 that they'd have to wait four to six weeks (O'Donnell, Tr. 1440, 1443), O'Donnell called Kelleher, representative of the wealthy defendant, Webster, and sought to bring Webster in as an investor in Kinzua (O'Donnell, Tr. 1435-7). He and Webster met on May 9, 1953, less than two weeks later, and agreed orally that Webster would take 50% of the deal. (O'Donnell, Tr. 1557). The deal never lay dormant for an instant.

FALSE:

The "later on" implies falsely a previous period of laying

of the time since the first of the month, and I am just getting around to catching up on some of my correspondence.

FALSE:

O'Donnell himself admits under cross-examination that this was "inaccurate." (O'Donnell, Tr. 1906).

FALSE:

When (your group) told me that (they had lost interest in the Kinzua deal) because of other utility deals, et cetera, that they had been interested in, (I more or less dropped the matter and it lay dormant for a couple of months). (Later on I ran into a fellow from Montreal) whom I had been engaged in business with in the Elk Timber Company in Canada some years ago. (I started talking to him about the deal) and he expressed a desire to know more about it. He is a man of very large interests and was in a position to put up a good deal of cash. (I then reinstituted negotiations with Coleman and 'low and behold' we made a deal.

FALSE:

The way the lumber market has been behaving recently, I am not too sure we couldn't have made a mistake; however, time will tell.

If we can ever be of service to your good company just let me know and I will put the sales-manager down there on your trail.

With best personal regards.

Very truly yours,

H. J. O'Donnell

FALSE:

O'Donnell himself testifies "This isn't right. I will admit that" (O'Donnell, Tr. 1908).

FALSE:

Negotiations on April 27, 1953, with Coleman were never broken off. Indeed, O'Donnell himself testified he told Coleman when Allyn indicated their temporary delay that "I don't like to lose the deal.... I would like to have time to talk to some of the other people..." (O'Donnell, Tr. 1441).

VI.

A TALE OF TWO LETTERS.

Letter No. 1.

We ask this Court to consider the following striking contrast:

Letter No. 1, is from O'Donnell to Joseph, dated September 22, 1953 [Ex. 93], and discloses in its fullest flower the character and motive of O'Donnell—his duplicity, his deception, his awareness of his guilt in betraying Joseph who had brought the Kinzua deal to him in good faith for both to acquire as a joint venture.

It is reproduced with brief analysis.

Letter No. 2.

Letter No. 2, dated August 27, 1953 [Ex. 87], is from Joseph to Terman, the broker who first discovered and submitted the Kinzua deal to Joseph.

This letter discloses:

1. Joseph's spontaneous indignation upon discovering O'Donnell's treachery;

* * * * *

2. Joseph's fidelity to and his concern for Terman, who was left out in the cold by O'Donnell's maneuver;

* * * * *

3. Joseph's determination to obtain redress.

This letter was written by Joseph almost immediately after reading in "The Timberman" that the Kinzua properties had been purchased by the O'Donnell group.

It is reproduced herewith.

HARRY JOSEPH
ONE NORTH LA SALLE STREET
CHICAGO 2, ILLINOIS

28890
17032

August 27,
1953

Sam Terman,
4121 Wilshire Blvd.,
Los Angeles, California

Dear Sam:

This morning my attention was called to the item appearing in the first paragraph of this trade report dated August 21st, 1953, "The Timberman".

Needless to say, I was shocked and surprised to learn this information. The last time I talked with you, you will remember, my last conversation with O'Donnell was that he was waiting for a Mr. Price, who, at one time or another, was part of the Weyerhaeuser & Walker interests, to come to Seattle and then go down to the mill and go over the standing timber of the Kinzua Pine Mills.

Of course, my first obligation is towards you, because of you having submitted this deal to me and then you know the rest of the story, I am sure. I do not know what you want to do about this and perhaps you know something about this deal. If you do, I would like to know, however, as for myself, I do not intend to let this matter drop. As a matter of fact, I had a talk with Sol Hoffman, who no doubt you know, and with whom I have discussed this deal, having in mind that if he felt the deal was good enough, he might even take a position in it. Of course, like the rest of my group, he asked me off and on now for some time, and I told them all the same thing, that as far as I knew, the deal was still being considered by O'Donnell and the group in Seattle and I was still waiting to hear from them.

At this writing I have not heard from O'Donnell since I last talked with him several months ago and I intend doing nothing about O'Donnell for the time being, until I hear from you.

*Lt. E. Terman 68-7/10/54
N. J. 3/6/56*

HARRY JOSEPH
ONE NORTH LA SALLE STREET
CHICAGO 2, ILLINOIS

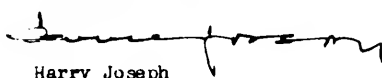
Sam Torman (2)

August 27, 1953

However, it would seem to me that your friend Needleman should have said something to you about this.

With kindest personal regards to your good wife, and hoping to hear from you soon on this matter, I am

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Harry Joseph", with a long horizontal stroke extending to the right.

Harry Joseph

HJ:as

P.S. It could be, if you will note the second paragraph in this bulletin that Forest Credits Act now in effect under which national banks may make loans on managed and protected forest tracts, made this deal possible at this time.

8/ 68-B.

VII.

O'Donnell as a Witness Was so Discredited by His Own Admissions of Untruthfulness and by Documentary Evidence Contrary to His Testimony That Nothing Substantial Was Left to His Testimony Against Plaintiff, and Any Finding Purported to Be Based Thereon Is Clearly Erroneous.

O'Donnell admittedly was untruthful in his dealings and in his testimony and statements in this case very often, and under most damning circumstances. This shocking degree of admitted untruthfulness, together with the documentary evidence against other aspects of his testimony, completely incredible aspects of other portions, and admissions wrung from him by confronting him with documents, render the few remaining remnants insufficient basis to provide the slightest rational support for the trial court's findings, which are clearly erroneous.

Whether the untruths are ones like his extraordinary denials in the deposition that he ever met Joseph at all on November 18, 1952, the day before the important Coleman meeting, or others such as denying he told Joseph that the timber would be evaluated at \$40.00 per thousand feet, O'Donnell's pattern is crystal clear, and so are the results. O'Donnell's pattern was one of minimizing such things as the role of, and O'Donnell's contacts with, Joseph, by every possible device, and then of backing off in a gingerly manner from untruthful blacking out of some aspect of Joseph's role when confronted with the grim and frightening reality of documents which demonstrated the O'Donnell untruthfulness. Let us briefly examine examples, and give this court some of the flavor of the untruthful character of O'Donnell's testimony—that same untruthfulness which neces-

sitated the fantastic number of *ten* single space pages of typed "changes" [Ex. 128] in O'Donnell's deposition, in a desperate attempt to bring it into some kind of approximate relationship with the demonstrable facts.

Before we do, this court's attention is earnestly invited to an examination of these "changes," contained in Exhibit 128, in evidence herein. Since the deposition of O'Donnell itself is printed *in its changed form*, it requires examination of the changes to reconstruct readily the untruths of the original deposition.

Let us turn then to an examination of a sampling of the truly remarkable untruths of defendants which can be demonstrated.

Until Forced to Admit the Truth by Overwhelming Documentary Evidence, Chinn and O'Donnell Falsely Denied That They Did Not Meet Joseph on November 18, 1952, in Portland.

Only documentary evidence forced Chinn and O'Donnell to admit the existence of their November 18, 1952, meeting with Joseph. Joseph's correct position throughout has been that he spent the entire late afternoon and evening of November 18, 1952, with O'Donnell and Chinn in Portland, Oregon, prior to the conference of the next day with Coleman, the agent for the sellers.

Chinn and O'Donnell on deposition *both*, with extraordinary parallelism, denied flatly any such meeting with Joseph. These denials are apparent in many places in the changes in the O'Donnell deposition. For example, on page 1 thereof, O'Donnell asserts "since the deposition I have recalled that we met Joseph the day before our meeting with Coleman although I had been originally under the impression that we did not meet with Joseph until the next morning."

A glance at the long list of changes in O'Donnell's deposition indicates that while he was repeatedly given the opportunity to refresh his recollection, he repeatedly denied meeting Joseph at the Heathman Hotel on November 18, 1952, registering with him, having dinner at the University Club with him, and spending the evening with him. This is evidenced by the changes to some seventeen or more questions indicated by Exhibit 128, most of them on the first three pages of such changes.

It is remarkable that Chinn and O'Donnell should both have denied remembering the November 18 meeting with Joseph. It is less remarkable that they should later, on the trial, and the changed depositions have admitted the meeting, the registration together, the dinner together at the University Club, going together to a cabaret, and Joseph's room as adjoining O'Donnell's, with Chinn being down the hall [O'Donnell, Tr. 3430-3434, 3444, 1591-1592; Chinn, Tr. 3278-3280, 3285-3287; 882-884].

Some men are born with good memory; others have memory thrust upon them; so here Chinn and O'Donnell. For they were now confronted with the November 18, 1952, Heathman Hotel Register (showing signatures of Chinn, O'Donnell and Joseph on consecutive registration slips, Nos. A-48683, A-48684 and A-48685, and showing them to have signed for room 540, 537 and 536 respectively) and other documents—and these thrust memory upon O'Donnell and Chinn [Exs. 27, 28, and 29]. It took such irrefutable things as this, and the University Club bill, to occasion the defendants' changes, and the wan admission of O'Donnell—"I can faintly remember seeing him in the lobby" [O'Donnell, Tr. 1617], and of Chinn—"I have a faint recollection that Harry Joseph was in the hotel when we got there" [Chinn, Tr. 884] (Note too the similarity, common for

Chinn and O'Donnell, of the sameness of minor detail they remember and the similarity even of the phrasing and choice of words).*

O'Donnell and Chinn, driven to it, sadly assented and backed down [Ex. 128; O'Donnell, Tr. 1620; Chinn, Tr. 986]. The fact of such meeting was now established, over their protests, by the documents.

The Incredible Twin Blackouts of Chinn and O'Donnell as to the Conversations of November 18, 1952, Are Defendants' Only Possible, Though False and Embarrassing, Second Lines of Retreat.

As above discussed, the agonizing pressure of incontrovertible rebutting documents made Chinn and O'Donnell admit they spent the evening of November 18, 1952, with Joseph. Indeed, O'Donnell even says he has "a faint recollection" of seeing Joseph "walking ahead of me into the dining room" of the University Club [O'Donnell, Tr. 1620]. But nothing more; O'Donnell's flexible and convenient memory does not even recall this as vividly as a meeting in St. Louis with Joseph many years ago, and of no particular importance [O'Donnell, Tr. 1620-1621]. Here we have the parties together all evening

*A possible source of the collusive falseness of the testimony of Chinn and O'Donnell in this regard is the grudgingly admitted fact that Chinn and O'Donnell met the night before O'Donnell's deposition [O'Donnell, Tr. 1650], and again for lunch during the deposition (O'Donnell says, typically "I don't know whether I had lunch with him, I think maybe I might have. It's quite possible I did, yes.") [O'Donnell, Tr. 1652.]

At the trial both urged they could hardly recall what if anything they spoke of on these meetings [O'Donnell, Tr. 1650, 1652; Chinn, Tr. 893], and Chinn denied asking O'Donnell what his story was on the deposition. The sameness of their admittedly erroneous denial of the November 18 meeting is proof that this also is false, and that they plainly did discuss their stories together.

Counsel, without assigning any reason, refused on deposition to let Chinn say what had been discussed at lunch between Chinn and O'Donnell. [Tr. 3249.]

until midnight or 1 a.m. [O'Donnell, Tr. 1632], on the eve of a multi-million dollar deal such as most men never approach in their entire lives, and Chinn and O'Donnell remember nothing of the conversation whatever, they say [O'Donnell, Tr. 1622-1623; Chinn, Tr. 901-902].

The inherent incredibility of the asserted inability to recall any of the evening's conversations is conspicuously apparent. Joseph's testimony that there was an explicit agreement of joint venture stands undenied, except tangentially by O'Donnell's feeling he remembers "things that have a direct effect on my business [O'Donnell, Tr. 1655]." O'Donnell, as we show later in this section, could not "remember" many things with direct effect on his business. His testimony here is purely conclusionary in character.

The fact is that Chinn and O'Donnell here were both placed in desperately embarrassing positions. To admit vivid recall of the evening's conversations, after previously denying the existence of such an evening's meeting at all, would be inconsistent with the vagueness that they desperately needed to blur the untruthfulness of their earlier asserted forgetting of existence of the evening's meeting. Thus they are forced to the denial that they recall the evening's conversation, and are hoist by the petard of their initial false denial of the meeting itself.

**The Fantastic Untruths of O'Donnell in His "Explanatory"
Letter of September 23, 1953, Stand Largely Admitted
or Conclusively Proved.**

O'Donnell, confronted by written expression of "surprise" by Joseph [Ex. 90], that O'Donnell had entered without Joseph into the Kinzua deal, naturally had to make some response. He did, in a letter of September 22, 1953 [Ex. 93], packed with admitted and obvious falsehood. A chart appended to this brief in the preceding

section "A Tale of Two Letters," details and rebuts these, many from the mouth of O'Donnell himself.

This court may well judge O'Donnell's credibility from this letter, in which he attempts to explain to Joseph the theft of Joseph's opportunity, brought to O'Donnell by Joseph to share together. We earnestly commend to this court's attention the crushing examination of O'Donnell by plaintiff's counsel [Tr. 1897-1907], dealing with this totally false letter. The excuses, grudging admission and falsity of O'Donnell's testimony generally are all magnificently illustrated in this relatively brief portion of the transcript, which leaves O'Donnell flayed and stripped of any possible pretense of truthfulness or credibility.

We shall not here cover again all the ground covered by the appended chart, which shows at least seven of the separate falsehoods of the letter.

In brief summary, it shows that, despite the letter's grotesque assertions:

(1) A. C. Allyn & Company was *not* Joseph's group, and O'Donnell knew it;

(2) Allyn did *not* drop out of the deal, as O'Donnell well knew;

(3) O'Donnell did *not* drop the matter;

(4) The deal did *not* lay dormant for a couple of months, or at all;

(5) O'Donnell did *not* run into Webster, but instead pursued him;

(6) O'Donnell did not just happen to start talking about the deal to Webster, but carefully arranged such talks and presentations;

(7) O'Donnell never broke off negotiations with Coleman, but instead used immediate earnest effort to keep them going.

Indeed, the chart does not include all the untruths which O'Donnell's letter contained. For example, O'Donnell asserts in his reply that he had been out of town most of the time since receiving the letter, written over three weeks before his reply. In actuality, his testimony was that during his general period he was "quite a bit at Kinzua," and "in working with Mr. Dunn a great deal in Seattle" [O'Donnell, Tr. 1897]. His trips to Kinzua were usually three or four days [O'Donnell, Tr. 1897]. He was not prepared to say that he ever stayed at Kinzua more than three or four days [O'Donnell, Tr. 1897-1898]; he was at Kinzua or Seattle most of the time.

We think once again the inference is clear that the reason the answer was so late was not that he was out of town most of the time (O'Donnell estimates he read the Joseph letter "a few days" after arrival [O'Donnell, Tr. 1898]), but simply that this was a terribly difficult letter for him to compose in somehow trying to pacify the surprise and justified anger of Joseph.

One comment is of importance to this court in regard to O'Donnell's lame explanations of the untruthful statements in the letter—"It was what I thought at the time. I really didn't stop to think about it . . . I wrote this thing out without thinking too much about it" [O'Donnell, Tr. 1899]. And again: "I tell you that I just carelessly wrote that letter, and that is all. I wasn't trying to fool him or anything" [O'Donnell, Tr. 1909]. And so on; and on.

Let the court be apprised that around this time this sequence of events, falsely related in O'Donnell's letter, was far from vague in O'Donnell's mind. When he received Joseph's letter, O'Donnell was in the middle of a hot dispute with Kelleher, to whom he was determined to avoid paying a commission.

For example, he told Kelleher, as he himself states, that if he insisted on a commission, “we are out of business” [O'Donnell, Tr. 1539]—*i.e.*, that O'Donnell would withdraw from the deal. This dispute went on during July, August and September of 1953—the same period as the Joseph-O'Donnell exchange of letters.

Now, as one portion of his effort to collect a commission, Kelleher sent, on August 20, 1953, a letter to O'Donnell [Ex. 84], carefully outlining in four single spaced typed pages the efforts of O'Donnell to reach Webster through Kelleher on April 28, 1953, and the Webster transaction. This letter was written only eleven days earlier than Joseph's own letter, and the course of events had therefore been most recently reviewed by O'Donnell when he wrote his completely untruthful letter to Joseph on September 22, 1953. The possibility of inadvertence or genuine forgetfulness, already microscopic, vanishes entirely.

At any rate, O'Donnell's credibility is further destroyed by his weaving of this letter's whole thin and shabby tissue of lies. We submit that this is truly a case wherein the rule of the *United States Gypsum* case is applicable, as stated in *Orvis v. Higgins* (C. C. A. 2), 180 F. 2d 537, cert. den. 340 U. S. 810. That rule is that if the evidence is partly oral and the rest is written or deals with undisputed facts, then the appellate court can ignore the trial judge's finding and substitute its own, “. . . if the written evidence or some undisputed fact renders the credibility of the oral testimony (NOTE: in support of the finding) extremely doubtful.”

This of course is precisely our situation. Defendants must take such sorry comfort as they can from the credibility of O'Donnell, and O'Donnell's testimony has been rendered, as a great understatement, “extremely doubtful.” It is so untruthful and demonstrably incred-

ible that the judgment and findings are plainly erroneous and subject to the review and reversal of this court.

The sly misstatements of O'Donnell are numerous and obvious despite the intensity of O'Donnell's efforts at concealment. We cannot cite all, but will give a few.

Outside Documentary Evidence Belies O'Donnell's Denial He Gave Joseph Information as to the Value of the Timber.

Joseph in his prospectus as to the Chicago investors included the information that the timber could be sold for \$40.00 [Ex. 381]. O'Donnell denies saying it could be thus sold [O'Donnell, Tr. 1725], saying he said only it *might* be *appraised* somewhere around that figure. (Clearly, O'Donnell at trial wanted to make it seem that the profit would be small, and that he had given Joseph little information which in any case Joseph misinterpreted.)

However, O'Donnell is caught up by outside documentary proof that he was thus representing the timber. For in two Kelleher memoranda, necessarily prepared by Kelleher on the basis of O'Donnell's information, we again find the same price stated *as the sales price* [Exs. 65 and 66]. Plainly O'Donnell is guilty once again of untruthfulness in denying he would state the timber could be sold at \$40.00 per thousand; he told it to Kelleher also, whom Joseph did not even know.

Only Under Pressure Did O'Donnell Admit, After His Contrary Testimony, That He Had Put No Additional Monies Into Kinzua for Improvements.

Typically, O'Donnell testified he had put up additional monies for improvements on Kinzua [O'Donnell, Tr. 1920], and that the total of expenses for improvements came to somewhere around \$800,000. Asked pointblank to produce checks of his or his group purporting to be

further advances to Kinzua since acquisition on August 17, 1953, he did not do so.

Instead, counsel for defendants, beating as discreet a retreat as possible from O'Donnell's position, made a statement they admitted ". . . might not be clear from the testimony of the witness" [O'Donnell, Tr. 1933]. That statement was, in essence, that the funds for improvements and betterments of Kinzua did *not* come from further advances of the buyers, as O'Donnell had earlier urged, and that there were *no* contributions from outside funds for those purposes [O'Donnell, Tr. 1933-1934].

Once again, the threatening pressure of documentation drove O'Donnell grudgingly and reluctantly toward the truth.

Concealment of the Interview With Honorable William J. Lindberg, United States District Court Judge Who Testified at the Trial.

As is disclosed by the testimony [O'Donnell, Tr. 1739-1740], O'Donnell in his answer to a pretrial interrogatory did not include Honorable William J. Lindberg, United States District Judge, who testified at the trial on his behalf, as a person whose deposition had not been taken but whom he had talked with about the lawsuit. When it finally became apparent from remarks of counsel that Judge Lindberg would be called to the stand, counsel for plaintiff asked whether O'Donnell had spoken to him about the case. O'Donnell actually started once again to deny it [O'Donnell, Tr. 1739], but then admitted that he had and urged that he "just didn't think about it when he answered his interrogatories" [O'Donnell, Tr. 1739].

Incidentally, Judge Lindberg, called to the stand as defendant's witness, testified in substance that he and O'Donnell were good personal friends [Lindberg, Tr. 1856], and that he had been at the November 6, 1952,

meeting of Terman, Chinn and O'Donnell, but could recall substantially nothing of that conversation [Lindberg, Tr. 1861-1862], except that toward the end of the stay there were some remarks as to apartment houses in Los Angeles, and that the conversation "could have been of a business character" [Tr. 1856].

In substance this testimony of Judge Lindberg does little more than confirm and corroborate that Terman was invited up to the suite by Chinn, and that ". . . he talked primarily . . . to Mr. O'Donnell and Mr. Chinn" [Lindberg, Tr. 1861].

O'Donnell, Time After Time, "Fails to Recall" (at Least Until After Confrontation With Documentary Proof) Important Contacts With Joseph.

O'Donnell plainly (and ultimately to a large extent admittedly) conversed by telephone with Joseph on November 26, 1952, November 29, 1952, and February 26, 1953. Yet (in protection of his position that there was little contact with Joseph), he "failed to recall" such conversations until again the proof required it of him.

He continued to deny the November 26, 1952, conversation with Joseph about Kinzua, even *after* proof [O'Donnell, Tr. 1932]. Joseph testified there was such a call while he was at La Quinta [Tr. 389-390]. Morris so testified [Morris, Tr. 4174]. Exhibit 34, a hotel bill, provides further documentary evidence of the making of a long-distance call. Under these circumstances, the existence of such a call is clear; yet O'Donnell would not admit it.

As to the November 29, 1952, call, this took place from the office of Joe Coleman, and was of importance, since it admittedly resulted in the arrangement of a meeting in Portland by O'Donnell with Coleman and the Wymans and Chinn [O'Donnell, Tr. 1674-1676].

O'Donnell on deposition denied that he talked to Joseph in this call at all [O'Donnell, Tr. 3460-3461], although

in point of fact it was Joseph who took a leading role in the call [Joseph, Tr. 395] at a meeting in Gold and Needleman's office, with Coleman and Terman also present [Joseph, Tr. 394; Ex. 365]. Joseph put in the call [Gold, Tr. 2967], after suggesting that O'Donnell should be reached and a further meeting set up [Joseph, Tr. 395; Terman, Tr. 1244].

On trial, O'Donnell finally grudgingly admitted that on this occasion he "apparently" spoke to Joseph, "because I believe Mr. Coleman said so in his deposition" [O'Donnell, Tr. 1673]. The evidence had become too overwhelming, and the admission had to be made. This sort of thing is very characteristic of the testimony of O'Donnell.

(Indeed, such O'Donnell untruths about telephone calls are not confined to his calls with Joseph. O'Donnell on another occasion, as part of his effort to attempt to squeeze someone else, Kelleher, out of any claim in the deal, sent him a wire asserting: "As you know, I tried to locate Howard (NOTE: Webster) directly before I called you" [Ex. 74]. Yet, O'Donnell's testimony on trial was that he did not put in any call to Mr. Webster, and did not know where to call him; he called Kelleher and reached him in New York [O'Donnell, Tr. 1436]. So the wire contained a flat untruth, by O'Donnell's own testimony. Plainly, in the Kelleher situation, as in the present far more serious one for him, O'Donnell was willing to and did tell untruths in efforts to escape legal responsibility for his actions.)

* * *

Only limitations of space and the patience of this court prevents the doubling or the tripling of this list of the demonstrable untruths of O'Donnell. But these limitations too must be respected, and so we will mention only a few matters showing the guilty awareness of O'Donnell.

**The Evasiveness of O'Donnell as an Oral Witness Was
Constant and Extraordinary.**

O'Donnell would not give straight answers. We submit that his was not the tongue of the verbally clumsy woodsman, as suggested by the trial court [Tr. 4249]. Rather, his were the words of the suspicious, fearful, cagy defendant with a great deal to hide and a great deal of determination somehow to achieve that hiding.

We mention a few of the numerous evasions.

As one example, consider his response when asked whether he told Joseph the company had a contract for 94,000,000 feet of pine. Captiously, he criticized the prospectus statement to this effect, repeating with less vigor the criticism that it must have been 80 to 90 million, rather than 94,000,000 [O'Donnell, Tr. 1746]. He did not recall giving anyone else the same figure; but after being confronted with Exhibit 644, a letter from Mr. Maxwell of Georgia-Pacific to another Georgia-Pacific executive, stating that O'Donnell had given him that figure, O'Donnell was again asked whether he had in fact given Maxwell that figure. He finally replied that it was "quite possible," and went on to admit he might have told Joseph the 94,000,000 figure also [O'Donnell, Tr. 1750].

Similarly, O'Donnell testified he called Maxwell to tell him he had become "reinterested" in Kinzua [O'Donnell, Tr. 1946]. Yet, asked if he would have called if not reinterested, balked some six times at answering [O'Donnell, Tr. 1987-1989], providing such circumlocutions as: "I was re-interested in taking a look to find out whether I would become interested in it" [O'Donnell, Tr. 1988]. Even the simple questions were answered with such remarkable caution as this.

O'Donnell's Evasiveness With Written Evidence.

An example of O'Donnell's evasiveness with regard to written evidence is his failure to produce two important wires to and from Kelleher [Exs. 72 and 74]. The parties stipulated that they should produce all documents in their control or counsel's possession, which might lead to the discovery of admissible evidence [Pretrial Order, Tr. 230]. Nonetheless, on deposition O'Donnell did not produce these telegrams, though he testified at the deposition that he had produced every document in his possession or control [O'Donnell, Tr. 3667].

On trial, O'Donnell said he never kept any of the Kelleher telegrams, but simply threw them all in the wastepaper baskets [O'Donnell, Tr. 1542]. He said in response to a question about correspondence between Kelleher and him that Kelleher "sent me several telegrams," and finally admitted sending one wire to him [O'Donnell, Tr. 1542, 1545], saying he would stop negotiations if Kelleher demanded a commission. Then he said later he might have the wires at home or at his office [O'Donnell, Tr. 1547]. He admitted he never looked for them, said he might still have them, that he "would have to look to find out" [O'Donnell, Tr. 1546-1547].

What is interesting is the failure of O'Donnell to obey either the stipulation or subpoena, and the fact that Exhibit 74 was the wire in which, as above related, O'Donnell flatly lied to Kelleher in telling him he had tried to reach Webster directly before calling Kelleher. This untruth is important, since it shows further O'Donnell's willingness to avoid the truth. And the admitted failure to produce or even look for the incriminating documents despite stipulation and subpoena further demonstrates the calculated evasion practiced by O'Donnell upon the court.

We think that the cited and typical instances of O'Donnell's untruths and evasions on important matters, many admitted under heavy documentary pressure, and all apparent, explode and wipe out the credibility of O'Donnell as a witness. Insofar as O'Donnell's testimony is necessarily relied upon to support the findings or the judgment, such findings are plainly open to independent review and to being overturned by this court.

VIII.

The Conclusion That O'Donnell and His Group Waited for Many Months Before Becoming Serious About the Kinzua Purchase Is Totally Unsupported; the Evidence Is Conclusive That O'Donnell Worked Hard From the Beginning to Complete the Kinzua Purchase.

A subsidiary but important—and completely erroneous—basis of the court's decision is that O'Donnell and his group were really not serious about purchasing Kinzua at all for some five months after Harry Joseph and Terman told O'Donnell and Chinn about Kinzua, and after Joseph took Chinn and O'Donnell up to the meeting he arranged with Coleman in Seattle. The thesis that if O'Donnell did not plan to buy Kinzua, he did not agree to buy it with Joseph, falls to the ground when we see how desperately O'Donnell fought for Kinzua throughout.

Defendants, and the court's findings, would have us believe—fantastically—that the early activity of O'Donnell and other defendants in November and December of 1952 was of a purely tentative character; that on December 19, 1952, such action ceased and the intention of O'Donnell for his group was to forget the deal entirely; and that only in April, 1953, or later, did any real intention of purchase materialize on the part of O'Donnell and his group, and only then did they move forward to purchase Kinzua.

Thus, the findings state that as of December 19, 1952, "O'Donnell determined not to pursue the Kinzua matter," [Findings VII(2), Tr. 257] and that his "determination . . . was definite and complete . . . and . . . made in good faith." [Findings VII(3), Tr. 258.] While the findings do then go on to recount a number of activities of O'Donnell and others relating to the Kinzua purchase, they assert that it was only during the latter part of March, 1953 that O'Donnell decided to "actively" investigate the feasibility of Kinzua's purchase [Findings IX(4), Tr. 263], and that it was shortly *after* that that Stuchell, the three Wymans and O'Donnell indicated their *possible* interest in each investing \$500,000 in Kinzua's purchase [Findings IX(4), Tr. 263].

All these cited conclusionary findings are in themselves clearly wrong, and are inconsistent even with many others of the more factual findings themselves. The findings, and the undisputed evidence, show that the deal was worked out by O'Donnell and his group in and around November and December, 1952, and constantly and persistently pushed forward to completion.

Let us examine and evaluate, to show how unfounded these conclusionary findings are, which would in effect have us believe that nothing serious was done by O'Donnell until around or after the end of March, 1953.

For one thing, the basic method of acquiring Kinzua, with its tax saving aspects, had been worked out in its essence by Dunn even before a conversation with Joseph between December 5 and 10, 1952. Dunn plainly says so himself [Dunn, Tr. 1010, 1026 and 1030]. In his conversation with Joseph he transmitted this information to Joseph, who put it into his prospectus of that period [Ex. 381]. Dunn and O'Donnell both admit that this information was for the most part correctly stated in Joseph's prospectus [Dunn, Tr. 1712-1718; O'Donnell,

Tr. 1710-1711]. So it must necessarily have been worked out then. Is this a mark of early lack of interest, effort, planning or activity? On the contrary.

Similarly, the planning for financing was started early and earnestly. The findings themselves admit that on or about November 26, 1952, only a week after the Portland meeting of Chinn, Joseph and O'Donnell with Coleman, O'Donnell and Chinn, together with O'Donnell's attorney and accountant, met with O'Donnell's bankers on the deal, and Kinzua's Portland bank was then contacted [Findings VI(1), Tr. 254].

On December 9, 1952, as conceded by the findings [Findings VI(4), Tr. 255], O'Donnell and his bankers, lawyer and accountant met with Kinzua's bankers to seek more information and convince them that O'Donnell's group was responsible and had sufficient resources to handle Kinzua's purchase and operate its properties [Findings VI(4), Tr. 255].

The findings admit at this same place that defendants Wyman, as early as December 9, 1952, were in the deal and were to invest.

O'Donnell conferred with Coleman on the following day, December 10, 1952, and made arrangements to visit and inspect the Kinzua properties [Findings VI(4), Tr. 255-256].

On December 15 through 17, 1952, O'Donnell and D. E. Wyman, with one other potential investor, visited and inspected Kinzua, inspecting its sawmill and factory operations and a portion of the timber [Findings VII(1), Tr. 256]. This was quick and energetic progress with their efforts in purchasing Kinzua.

Winter weather prevented inspection of the main part of the timber at this time [Findings VII(1), Tr. 256]. O'Donnell, not giving up any of his interest, settled

down, as far as further physical inspection was concerned, to wait for spring for a final check on the timber. He knew that nothing could be done by way of timber checking until spring. O'Donnell himself admits that on the first trip not enough of the timber could be seen to form a final opinion, but stated there hadn't been any misrepresentation by Coleman of the Kinzua timber [O'Donnell, Tr. 1773-1774].

When O'Donnell returned to his home in Seattle following the inspection of the Kinzua property, his wife felt ill and he was up with her most of the night of December 18, 1952 [Findings VII(2), Tr. 257]. Because of this, and one investor's decision not to participate in Kinzua in investment or operation, supposedly O'Donnell decided not to pursue Kinzua [Findings VII(2), Tr. 257; O'Donnell, Tr. 1784-1785].

But in reality O'Donnell never even wavered in his iron determination to buy Kinzua.* We will see that from the efforts made with regard to Kinzua only a

*Almost like the commentary of the chorus in Greek classical drama is the conversation of attorney George Gold (lawyer for a large Kinzua stockholder) and John Casey (Kinzua attorney), on December 23, 1952, shortly after the pretended O'Donnell drop-out. [Ex. 43.]

Their view as to O'Donnell's lack of genuineness in asserting he would drop out, and as to his failure to keep Joseph, the originator of the deal, informed, is most illuminating.

Gold comments (p. 2) “. . . the reasons given to Joseph just didn't seem to be logical or hold any water at all.”

“. . . *what O'Donnell said, asking for liberty to suggest a deal to somebody else, does suggest perhaps a back-door approach of acquisition, shaking Joseph out.*” (Emphasis added.)

“. . . apparently he's the one who was originally interested. How he got O'Donnell in I don't know.”

Casey, discussing a failure to keep Joseph informed, while the deal was very hot, says, “. . . it seemed to me a little strange that Joseph didn't know, when he was the originator of the whole situation, because at that time we were having almost daily conferences with their counsel.” (P. 3.)

few days later. And the extraordinary flimsiness of even the temporary excuse of Mrs. O'Donnell's illness will now be shown from the testimony of defendant's own witness.

The testimony of Dr. Thomas H. Holmes, conclusively refutes the possibility that any worsening illness of Mrs. O'Donnell, around December 18, 1952, could have been an important or long-continued factor in any supposed loss of interest by O'Donnell in the Kinzua purchase.

Dr. Holmes, called by defendants, testified that he was the physician of Mrs. O'Donnell and a qualified psychiatrist [Tr. 1967-1968]. While she had earlier had migraine headaches and depression and anxiety states [Tr. 1968], she improved during September, October and November of 1952 [Tr. 1972]. A major social engagement was planned for December 21, 1952 by her [Tr. 1973]. This was a severe test and again made her depressed and anxious before the party [Tr. 1973-1974]; but she was able to give the party and there was a "very dramatic change for the better" [Holmes, Tr. 1974] following that party, and a steady progressive improvement after that time.

Since she was able to give this party, and was seen on December 24, 1952 by the physician, and found to be dramatically improved [Tr. 1973-1974], she could have been seriously ill at most for two of three days after her unfortunate relapse of the 18th of December under the strain of her gay party preparations. There does not appear to have been any relapse thereafter; only the "dramatic change for the better" [Holmes, Tr. 1974], and "steady, progressive improvement." [Holmes, Tr. 1975.]

Plainly, if O'Donnell had not previously regarded the years of his wife's illness as a barrier to his going into the business deal with Kinzua, surely the few days of

illness during the expectable tension attendant on the planned party for her godchild, followed by such great and happy improvement, could not have been a serious adverse factor in any decision regarding purchase of Kinzua.

Attorney Dunn, according to his own testimony and time sheets, did legal work on the Kinzua deal on December 23, 1952 [Dunn, Tr. 1020], just four days after the alleged drop-out intention of O'Donnell.

Activity went on continuingly. Thus, on December 31, O'Donnell got a call in Seattle from Mack Marshall in Spokane wanting to discuss Kinzua [O'Donnell, Tr. 1803], and stating that according to the Chicago office of A. C. Allyn & Company Harry Joseph had brought this deal on Kinzua in [O'Donnell, Tr. 1804]. O'Donnell gave Marshall the information on Kinzua as an opportunity to buy timber at big-tract prices and get it into individual hands and sell it on short-term prices [O'Donnell, Tr. 1806].

Then, in late December, 1952, or around January 1, 1953, O'Donnell was talking with the Wymans about Kinzua, and they thought they would each put in a half million dollars [O'Donnell, Tr. 1419-1420]. Thus, O'Donnell's financing arrangements continued, less than two weeks after the alleged "drop-out" of O'Donnell—a drop-out which did not keep the lawyer from working on the deal, and did not keep the members of O'Donnell's group from sitting around and talking about the deal and from offering to put up a million and a half, or O'Donnell himself from saying he would put up one-half million [O'Donnell, Tr. 1419].

Only a few days after this, O'Donnell spoke to Marshall himself and told him he wasn't considering the purchase right then, but might feel better about it when he returned from Palm Springs [O'Donnell, Tr. 1808].

O'Donnell also discussed with Marshall the question of getting somebody in the timber to look at it later on [O'Donnell, Tr. 1808], and stated he would call Marshall if the timber looked all right and if O'Donnell was "*still* interested." (Emphasis added.) [O'Donnell, Tr. 1808.]

Marshall in adding significant details of this conversation makes clear the real reason why O'Donnell wanted to wait for a time before completing the purchase. O'Donnell told him the sellers claimed to have so many million feet of pine, but ". . . that the damn thing was all snowed in, and he didn't know what we could do; that we would have to wait . . ." and added that he couldn't "get in to see the timber." [Marshall, Tr. 3352]. The waiting was primarily until someone could look at the timber; "Harry told me that there was so much snow over there that nobody knew what they had." [Marshall, Tr. 3353.]

Concerning this conversation, O'Donnell told Dunn that the possible Allyn contribution seemed encouraging; and that he couldn't look at the timber because of snow anyway, "but that he might well revive his interest in the Spring." [Dunn, Tr. 1034-1035.]

Admittedly only pretending disinterest to Coleman, O'Donnell asked him if he'd talk to another concern, Georgia-Pacific. O'Donnell thought there was a good chance to raise the rest of the money, "but Joe Coleman I told that I was a little lukewarm . . . I was going to Palm Springs to forget about it." [O'Donnell, Tr. 1817.]

O'Donnell testified that, around January 5, 1953, while he denied a definite agreement with Joseph, he said: "We would see what we could raise and what he could raise, and when it looked like the money was available, the thing would be adjusted." The O'Donnell group and

the Joseph group would each raise as much money as it could, and then get together and allocate [O'Donnell, Tr. 1732].

The important thing for O'Donnell now was to be able to look at the timber, which couldn't be done during the winter because of the snow. So therefore O'Donnell went calmly to Palm Springs; but nonetheless drove ahead on those portions of the deal as to which action was possible. For one thing, his associate David Wyman, in late January or February, 1953, introduced Dunn to Price, the timber expert, and suggested that Price be sent down to look at Kinzua [Dunn, Tr. 1035].

Early in February, 1953, O'Donnell, after previous arrangement with Joe Coleman, talked to Carl Coleman, another authorized seller, and Joe's brother, in Shadow Mountain near Palm Springs. Carl told O'Donnell his brother Joe "will be along pretty soon." [O'Donnell, Tr. 1818-1819.] Carl said the Wymans would probably like to see Joe [O'Donnell, Tr. 1819-1821].

On February 27, 1953, this important meeting between buyer and seller was held. O'Donnell met Joe Coleman at the Thunderbird Golf Club just outside of Palm Springs, with Carl Coleman, Mike Coleman and defendant Wyman, Senior [O'Donnell, Tr. 1827-1828]. Wyman said ". . . they would like to get someone in to look at the timber." [O'Donnell, Tr. 1830.] Coleman said when it looked like someone could get in, he would let O'Donnell know. The properties were not then accessible for viewing and there was still snow on the ground [O'Donnell, Tr. 1832].

On March 18, 1953, Joe Coleman, following up the arrangement, in fact called O'Donnell in Palm Springs and told him that in about a week a man could get in and get a pretty good look at the timber. O'Donnell told

Coleman that the Wymans had a man down in California they were going to have stop there [O'Donnell, Tr. 1835].

The usual vagueness of O'Donnell here as to the conversation can be filled out by the notations in the daybook of John T. Casey, Kinzua attorney, for March 18, 1953 [Ex. 424]. His memorandum in this regard is:

“Extended conference via long distance with Joe Coleman at Seaside, in re long distance conference with Carl and Mike in re conditions in woods and ability of timbermen to get over the same, and in re long distance conference of March 18, 1953, with Harry O'Donnell at Palm Desert, and extreme interest of these prospective purchasers.”

Then O'Donnell called Wyman, and Wyman arranged to have Price inspect the timber [O'Donnell, Tr. 1835-1836]. Following his two or three day inspection, Price made his report to O'Donnell [O'Donnell, Tr. 1836-1837] at the end of March. O'Donnell called Marshall and Joseph, and discussed the report and map with the three Wymans and Stuchell [O'Donnell, Tr. 1837-1838].

In the call to Marshall, an appointment was made by O'Donnell to meet Marshall at Kinzua around April 9, 1953 [O'Donnell, Tr. 1840]. It later developed that Marshall could not go, but Stuchell and O'Donnell went nonetheless and looked at the timber with the Kinzua logging manager [O'Donnell, Tr. 1840, 1844-1845].

Even before the April 9 trip by O'Donnell and Stuchell to Kinzua, Dunn's timesheets and his testimony show he was spending time once more on the Kinzua deal [Dunn, Tr. 1036].

* * * * *

From the foregoing mass of evidence and much more which could be adduced, it is clear that at no time did O'Donnell's active driving interest in and pursuit of the Kinzua deal ever fail.

IX.

The Defense of Laches, Estoppel, and Speculative Delay Are Completely Inapplicable Where the Elements of These Affirmative Defenses Are Lacking in the Record, and Especially Under the Circumstances of This Case.

To find, as the trial court purported to do [Findings XIV-XVI, Tr. 276-280; Conclusion of Law IX, Tr. 283], that Joseph is barred by laches, estoppel, or speculative delay is totally inappropriate to the circumstances of this case, and such a holding must be swept aside along with the other findings denying the existence of the fiduciary relationship and joint venture and its binding character.

On the Record on These Issues Which Is Before the Court, the Findings as to Laches, Estoppel, and Speculative Delay Are Clearly Erroneous.

The evidence which we do have, and the findings, do not support the conclusion of law or judgment relating to these defenses of laches, speculative delay or estoppel, or establish their vital elements. They speak of the purchase price of \$12,250,000 [Finding XV, Tr. 277], but they do not speak of the price as being high in relation to the value of the property. Where was the harm to defendants if, as may be the case for all the record or findings show, at all times they had a property worth to them vastly more than the purchase price, and have made vast profits? (In this connection, it is worthy of note that the total down payment was later reduced from \$4,800,000 to \$3,345,000 [Finding XI(1), Tr. 268] and that, as defendants' counsel stipulated [Tr. 1934], any amounts thereafter spent in improvements, betterments

or other expense in Kinzua were obtained from the down payment or other funds acquired in the purchase; no more funds had to be put into Kinzua.) No injury whatever is shown to defendants.

Furthermore, the changes or efforts put forth by O'Donnell and his group in regard to Kinzua after purchase were the same as they would have been had Joseph acquired 50% instead of Webster. That is the testimony of O'Donnell himself [O'Donnell, Tr. 1991].

* * * * *

Although it turned out not to be simple securing counsel to handle this complex matter at such a distance from plaintiff in Chicago, plaintiff actually commenced with this effort at once, in accordance with his announced intention [Ex. 87].

In September of 1953 he communicated with Sol A. Hoffman, a Chicago attorney [Hoffman, Tr. 1117; Exs. 90, 93 and 95], concerning the handling of this lawsuit, but after some delay in Hoffman's office, Hoffman recommended it be sent to local counsel out West [Hoffman, Tr. 1119], as otherwise involving much travel and time away from Chicago. It was referred to Paul Ziffirin of Los Angeles [Hoffman, Tr. 1119]. After some correspondence with another attorney in Seattle, the file was sent to the office of present counsel Stanford Clinton around January or February of 1955 [Hoffman, Tr. 1117].

* * * * *

Such defenses as these, under general and Washington law (applicable by stipulation to this defense [Tr. 245]), must have their elements proved affirmatively by the party asserting them, and are not to be presumed to exist.

X.

**The Legal Consequences of the Established Facts
Requires Granting of Relief to Plaintiff.**

If this reviewing court, as we believe it will, agrees with our thesis that on the facts defendant O'Donnell manifestly perpetrated a colossal steal upon plaintiff Joseph in elbowing him completely out of his own deal, we believe there will be no difficulty in applying the plain legal principles involved.

This is a case wherein federal jurisdiction is based on diversity of citizenship, and of course the applicable state law is to be employed on matters of substance. By agreement of the parties, as reflected in the recitals precluding the trial court's findings of fact [Findings of Fact, Tr. 245], the law of the State of Oregon governs any relationship between Joseph and O'Donnell, and the creation or termination of any such relationship. This is indicated also in the trial court's conclusions of law [Conclusion of Law, Tr. 280]. In any event, it does not appear that the Oregon law is significantly different from general law.

A brief comment on certain applicable principles and Oregon authorities will now be made. It will further demonstrate, we submit, that a judgment for plaintiff, on the astounding chicanery of defendant O'Donnell revealed by this record, was and remains the only appropriate one.

**(a) A Contract of Joint Adventure May Be Implied in Part
or Whole From the Conduct of the Parties.**

It is the general and Oregon law that not only direct testimony as to a joint venture agreement, but also the conduct of the parties should be examined to determine whether a joint venture agreement should be implied therefrom. Thus, in *Lane v. National Insurance Agency* (1934), 148 Ore. 589, 37 P. 2d 365, the appellate court held that a contract of joint venture might be implied from

the conduct of the parties, and that this rule “permits and requires a consideration not only of the testimony directly indicating that there was such a contract, but also of the evidence which shows the course of dealing” (p. 368, Pac. Rep. citation.)

This general principle is enunciated again in such cases as *Preston v. Industrial Accident Commission* (1944), 174 Ore. 553, 149 P. 2d 957, 961, and *Call v. Linn* (1924), 112 Ore. 1, 228 Pac. 127, 129.

Thus we see that the agreement here is plainly proven in two ways—directly and indirectly.

Directly, we see that Joseph’s testimony as to the existence of the joint venture agreement is basically unchallenged and undenied by the incredible amnesia of both O’Donnell and Chinn, who had to admit the spending of the evening of November 18, 1952 with Joseph, but weakly claim they do not recall the events of that evening [O’Donnell, Tr. 1609; Chinn, Tr. 901].

Too, the testimony of O’Donnell himself (more fully stated in the section on existence of a joint venture) is that “Harry Joseph was to get whatever he could back east” [O’Donnell, Tr. 1813]; “I didn’t have any more right to decide (NOTE: how much Joseph could get) than he had to decide” [O’Donnell, Tr. 1735]; the Chicago group was to raise “. . . (w)hatever we couldn’t raise” [O’Donnell, Tr. 3555]; after raising the money, the O’Donnell group “would get together and allocate it.” [O’Donnell, Tr. 3555.]

Indirectly, the entire course of dealing between the parties, as discussed in the sections relating to the conduct of O’Donnell and Joseph, further reinforces the explicit testimony. Their conduct was in conformity with, and necessarily implied, the existence of such joint venture agreement so completely as to render incredible and manifestly any contrary interpretation.

(b) Joint Venturers Stand in Fiduciary Relationship to One Another and Are Required to Deal With One Another in the Highest Degree of Good Faith.

In Oregon and generally, where a joint venture exists, the venturers stand in a fiduciary relationship to one another and must exercise the highest degree of good faith. Thus, in *Walls v. Gribble* (1942), 168 Ore. 542, 124 P. 2d 713, one joint venturer was held to account to another where he concealed from the other important information concerning the deal, and got that other to terminate his interest, in ignorance of the important information.

The court quoted 30 Am. Jur., Section 34, with approval:

“The relationship between joint adventurers, like that existing between partners, is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise. This is especially true of those to whom the conduct of the transaction, or the property involved therein, is entrusted. Such a party will be regarded as a trustee and will not be permitted to enjoy any unfair advantage because of his possession or control of the joint property. The mere fact that he is intrusted with the rights of his coadventurers imposes on him the duty of guarding their rights equally with his own, and he is required to account strictly to his coadventurers; and if he is recreant to this trust, any rights they may be denied are recoverable.” (p. 714, Pac. Rep. citation.)

In the instant case also O'Donnell was entrusted with the handling of the negotiations; in the instant case also he concealed vitally important information concerning the quality and quantity of the timber (he admittedly never

communicated with Joseph after March 31, 1953, until the Kinzua deal was made [O'Donnell, Tr. 1931], and never told him about the favorable cruise taken in June-July, 1953, or concerning the temporary delay of Allyn & Company with its effect on financing [O'Donnell, Tr. 1931], or concerning the April and May, 1953, possibility of having Webster come in for part of the financing).

Here too, concealing from his joint venturer vital facts, and failing to act toward him with honor and rectitude, O'Donnell should be held to account as a constructive trustee.

Thus, in the case of *McIver v. Norman* (1949), 187 Ore. 516, 205 P. 2d 137, in reversing a decree of dismissal in a suit by plaintiff for an accounting of a joint venture, the appellate court laid heavy stress on the fiduciary relationship of joint adventurers, and the absolute good faith required of the trustee to whom the deal or property may be required. As the opinion says, and as is here the case also, “. . . if he is recreant to his trust, any rights they may be denied are recoverable.” (p. 139, Pac. Rep. citation.)

The joint venture relationship, regardless of differences between the venturers—continued to exist for purposes of accounting.

The same principles are enunciated and followed in *Thimsen v. Reigard* (1920), 95 Ore. 45, 186 Pac. 559.

(c) Where There Is a Joint Venture Agreement, the Law Implies Equality of the Shares Unless There Is a Contrary Arrangement on This Score.

Elsewhere in this brief, it is made, we believe, abundantly clear that there was an express joint venture agreement proved for a precisely equal division of the purchase of Kinzua between plaintiff and O'Donnell.

However, it is in any case the law that even were this joint venture to rest on the conduct of O'Donnell and Joseph rather than the express agreement, still the proportion of the deal to go to each would be equal.

Thus, in *Campbell's Automatic Safety Gas Burner Co. v. Hammer* (1915), 78 Ore. 612, 153 Pac. 475, the court held that an agreement to sell stock as sole agents made each a participant in a joint venture, which as between them created a fiduciary relationship. Under such circumstances, the court held, there exists a presumption that each party had an equal share in the enterprise.

* * *

It is submitted that the substantive legal principles involved in this case are plain, and that if appellant's factual argument is accepted, his entitlement to relief is clear.

Conclusion.

In closing, we do not feel that an elaborate peroration is appropriate or required. We think that the evidence herein cited overwhelmingly establishes, largely from the admissions of the defendants and from documentary evidence, that the findings, conclusions of law and the judgment of the trial court, insofar as they purport to find against the formation and continuing existence of a joint venture between O'Donnell and Joseph for the purchase of Kinzua, on suitable terms, and the gross violation by O'Donnell of his fiduciary obligations, are clearly and manifestly erroneous.

As many as three sets of defendants, separately represented at trial, may write briefs totaling hundreds of pages in reply to the facts herein set out. Try as they

will, they cannot keep the facts presented in this record from speaking persuasively to this court of the transgressions of legal and equitable obligation engaged in by defendants; the truth shines out of this record despite all the efforts of certain of the defendant witnesses to obfuscate it.

The respondents' briefs will cover many matters, but must concern themselves with fringe questions, and cannot cope with or affect the basic pattern of defendant O'Donnell's duplicity and violation of plaintiff's rights. For this duplicity and these violations stand overwhelmingly proved by the reluctant admissions of defendants themselves, by the documentary evidence amassed before the trial court, and by the impossibilities and self-contradictions generated by defendants' stories.

The judgment of the trial court dismissing the action should be reversed, and the matter remanded to the district court for further proceedings not inconsistent with such reversal and with what appellant believes to be the plain admissions requiring a finding of equal joint venture between O'Donnell and Joseph to purchase Kinzua.

We respectfully submit that the judgment of the trial court requires reversal as being based upon findings which are clearly erroneous, and for the other reasons herein stated and urged.

PRITZKER, PRITZKER & CLINTON,
STANFORD CLINTON and
LAWRENCE WILLIAM STEINBERG,
Attorneys for Plaintiff and Appellant Harry Joseph.



APPENDIX A.

Alphabetical Identification of Persons Mentioned in the Record.

NOTE: The following list is not intended as entirely complete or as completely characterizing the persons referred to. It is simply intended to furnish for this court a handy reference identification of many of the leading persons referred to in the lengthy record.

ARTHUR C. ALLYN: Investment banker from Chicago, chairman of the board of A. C. Allyn & Co.; acquainted with plaintiff Harry Joseph for many years [Allyn, Tr. 2869-2870].

GERSON BERNSTEIN: a Detroit certified public accountant who represented Anderson Lumber Company and provided Terman some Kinzua information [Gold, Tr. 2912].

ISADORE CALLNER: Treasurer and buyer of the Joseph Lumber Company [Callner, Tr. 2109].

JOHN CASEY: An attorney representing the Kinzua Lumber Company sellers, and advising Joseph Coleman [O'Donnell, Tr. 1628].

DAVID S. CHESROW: Chicago attorney and real estate investor. Friend of Harry Joseph, who agreed to invest \$250,000 in Kinzua [Chesrow, Tr. 1507-1508].

RALEIGH CHINN: An intimate friend of O'Donnell [Chinn, Tr. 786-787] and business intimate of Harry Joseph for many years [Chinn, Tr. 788-789]. First O'Donnell group member to get information from Joseph and Terman on Kinzua [Chinn, Tr. 802]; advised O'Donnell of possibility of Kinzua purchase [Chinn, Tr. 839]. A Kinzua investor and defendant.

CARL COLEMAN: A brother of Joseph Coleman and himself a selling agent for the Kinzua stock; visited by O'Donnell during the winter of 1952-1953 at Shadow Mountain, California [O'Donnell, Tr. 1819].

JOSEPH COLEMAN: President of the Kinzua Lumber Company; active in the sale of Kinzua [Joseph, Tr. 353].

BRYANT R. DUNN: Seattle attorney, represented O'Donnell's group in Kinzua deal, and a defendant and purchaser of Kinzua stock [Dunn, Tr. 1008].

IRA FIELDS: Chicago Certified Public Accountant; auditor for Joseph Lumber Company [Fields, Tr. 1183].

J. GEORGE GOLD: California attorney, represented a major indirect shareholder in Kinzua [Gold, Tr. 2884]; advised Terman that Kinzua stock was for sale [Gold, Tr. 2907].

SOL A. HOFFMAN: Chicago attorney and investor; friend of Joseph, agreed with him to invest \$250,000 in Kinzua [Hoffman, Tr. 1100, 1107].

THOMAS H. HOLMES: A doctor and psychiatrist, treated Mrs. O'Donnell, and testified as a witness for defendants [Holmes, Tr. 1966-1971].

SAMUEL C. HORWITZ: Chicago attorney, business executive, Master in Chancery [Horwitz, Tr. 1479]; knows Joseph for 30 years, and a business associate [Horwitz, Tr. 1480-1481]. Agreed with Joseph to invest \$250,000 in Kinzua [Horwitz, Tr. 1481].

HARRY JOSEPH: Plaintiff in this case. A substantial Chicago lumberman and businessman, President of the Joseph Lumber Company [Joseph, Tr. 314-319].

HUGH G. M. KELLEHER: A New York financial consultant, contacted by O'Donnell to interest Howard Webster in the Kinzua deal [Kelleher, Tr. 3028-3042]. Later he sought commission from O'Donnell [Kelleher, Tr. 3135, 3147, etc.].

IRVING KESTERSON: Manager of a lumber plant for the Wymans; visited the Kinzua properties with O'Donnell [Tr. 1758-1759].

WILLIAM J. LANCASTER: Chicago attorney, friend of Joseph; agreed with him to invest \$50,000 in Kinzua [Lancaster, Tr. 4228-4231].

WILLIAM J. LINDBERG: United States District Court Judge from Seattle; friend of defendant Harry O'Donnell; travelled with O'Donnell to Los Angeles in November, 1952 [Lindberg, Tr. 1855-1858].

W. M. MARSHALL: Representative of A. C. Allyn Company; represented that firm in investigation into Kinzua deal [Marshall, Tr. 3346, 3349].

MARK F. MATHEWSON: Seattle attorney, represented Howard Webster in his purchase of fifty per cent of the Kinzua deal [Mathewson, Tr. 2002-2003].

LAWRENCE MCCLELLAN: An associate of O'Donnell's; got a heart attack and did not participate in the Kinzua purchase [O'Donnell, Tr. 1426].

MILTON H. MORRIS: A Chicago investor and friend of Harry Joseph for thirty years [Morris, Tr. 4170]. Agreed with him to invest \$250,000 in Kinzua [Morris, Tr. 4173].

ANDREW MUNGER: President of the Seattle First National Bank; discussed Kinzua purchase with O'Donnell [O'Donnell, Tr. 1665, 1667-1668].

JAMES J. NEEDLEMAN: Beverly Hills attorney, partner of J. George Gold [Needleman, Tr. 2691] represented Gladys Anderson, an indirect but major Kinzua stockholder [Needleman, Tr. 2697-2698]. Disclosed existence of Kinzua deal to Terman [Needleman, Tr. 2713-2714].

HARRY J. O'DONNELL: Defendant in this suit; Seattle, Washington, lumberman and clubman [O'Donnell, Tr. 1405-1407].

MARGARET O'DONNELL: Wife of Harry O'Donnell [Holmes, Tr. 1967].

HARRIS PERLSTEIN: Chairman, Pabst Brewing Company, friend of Joseph for many years; agreed with him to invest \$250,000 in Kinzua [Perlstein, Tr. 4198-4200].

HENRY RUSSELL PLATT: Banking and business executive; knew Joseph; agreed to invest \$250,000 with him in Kinzua and offered to help secure further funds if needed [Platt, Tr. 4206-4207, 4213].

ABRAHAM PRITZKER: A Chicago attorney; a friend of Joseph; agreed with Joseph to invest \$1,000,000 with Joseph in Kinzua [Joseph, Tr. 2346-2348].

ALVIN SCHWAGER: One of the O'Donnell group participating in the Kinzua purchase [O'Donnell, Tr. 1413-1414].

HENRY F. SHOEMAKER: Private banker from Seattle and Switzerland; business associate of Howard Webster [Shoemaker, Tr. 2050-2053].

DON SILVERTHORNE: Officer of the First National Bank of Portland; present at meeting to discuss Kinzua financing with O'Donnell [Tr. 1683].

ED STUCHELL: An O'Donnell associate; one of the O'Donnell group participating in the Kinzua purchase to the extent of about ten per cent [O'Donnell, Tr. 1426, 1429].

SAMUEL E. TERMAN: A real estate broker and investor in Los Angeles [Terman, Tr. 1145-1146]. Friend of Joseph [Tr. 1147]. First heard of Kinzua deal, and as a broker gave the information to Joseph [Terman, Tr. 1148, 1161].

HENRY THOMAS: A timber cruiser, employed by O'Donnell and his group, who started in June, 1953, did a check cruise of the Kinzua timber and provided a favorable report [O'Donnell, Tr. 1567, 1570].

CLAYTON WATKINS: Manager of the Metropolitan Branch of the Seattle First National Bank [Tr. 1657].

R. HOWARD WEBSTER: Managing director of Imperial Trust Company in Montreal [Webster, Tr. 2650-2651]. Bought 50 per cent of the Kinzua deal with O'Donnell [Webster, Tr. 2657].

D. E. WYMAN: Associate of O'Donnell; one of the O'Donnell group participating in the Kinzua purchase [O'Donnell, Tr. 1411-1412, 1417].

MAX H. WYMAN, JR.: Associate and one-time employee of O'Donnell; one of the O'Donnell group participating in the Kinzua purchase [O'Donnell, Tr. 1411-1412, 1417].

MAX WYMAN, SR.: An O'Donnell associate; contemplated investment in Kinzua but did not; instead his two sons did participate with the O'Donnell group [O'Donnell, Tr. 1412, 1422].



APPENDIX B.
LIST OF EXHIBITS.

Plaintiff's Exhibits in Evidence.

(NOTE: Exhibits admitted only as parts of admitted depositions are herein listed as having been offered and admitted at the points in the record where they were offered and marked for identification in the depositions.)

<u>Number</u>	<u>Page of Record Where Identified*</u>	<u>Page of Record Where Offered in Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
2	PTO-A-1	1212	1212
3	PTO-A-1	1212	1212
4	PTO-A-1	328	328
5	PTO-A-1	329	330
6	PTO-A-1	1167	1168
7	PTO-A-1	1291	1292
8	PTO-A-1	1291	1292
9	PTO-A-1	1291	1292
10	PTO-A-1	1212	1212
11	PTO-A-1	333	334
12	PTO-A-1	332	332
13	PTO-A-2	1212	1212
14	PTO-A-2	2934	2934
15	PTO-A-2	2982	2982
16	PTO-A-2	1176	1176
17	PTO-A-2	1291	1292
18	PTO-A-2	1212	1212
19	PTO-A-2	2942	2942
20	PTO-A-2	355	355
22	PTO-A-2	2951	2951

*A majority of the exhibits were originally identified in the Pre-trial Order (herein abbreviated PTO) Schedules A, B and C, which schedules are individually paginated.

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
23	PTO-A-2	369	369
24	PTO-A-2	369	369
25	PTO-A-2	370	370
27	PTO-A-2	895	895
28	PTO-A-3	895	895
29	PTO-A-3	895	895
30	PTO-A-3	895	895
31	PTO-A-3	895	895
32	PTO-A-3	895	895
33	PTO-A-3	2956	2956
34	PTO-A-3	390	390
35	PTO-A-3	1352	1352
36	PTO-A-3	2960	2961
37	PTO-A-3	2963	2963
38	PTO-A-3	402	402
39	PTO-A-3	402	402
40	PTO-A-3	407	407
41	PTO-A-3	431	431
42	PTO-A-4	431	431
43	PTO-A-4	2983	2983
45	PTO-A-4	447	447
46	PTO-A-4	458	458
47	PTO-A-4	1212	1212
48	PTO-A-4	630	630
49	PTO-A-4	1291	1291
50	PTO-A-4	1212	1212
51	PTO-A-4	369	369
52	PTO-A-4	456	456
53	PTO-A-4	1212	1212
54	PTO-A-4	463	463
55	PTO-A-4	464	464
56	PTO-A-5	2510	2510

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
57	PTO-A-5	469	469
61	PTO-A-5	3045	3045
62	PTO-A-5	3063	3063
65	PTO-A-5	3072	3072
66	3099	3103	3103
68	3114	3115	3115
72	PTO-A-5	3130	3130
73	PTO-A-5	3130	3130
74	PTO-A-5	3131	3131
75	PTO-A-6	3132	3132
76	PTO-A-6	3136	3136
78	PTO-A-6	3136	3136
79	PTO-A-6	3142	3143
80	PTO-A-6	3143	3143
81	PTO-A-6	3147	3147
82	PTO-A-6	3148	3148
83	PTO-A-6	3149	3149
84	PTO-A-6	3151	3152
85	PTO-A-6	3153	3153
86	PTO-A-6	471	471
87	PTO-A-6	473	473
88	PTO-A-6	2025	2025
89	PTO-A-6	2025	2025
90	PTO-A-6	473	473
91	PTO-A-7	3157	3157
92	PTO-A-7	474	474
93	PTO-A-7	475	475
94	PTO-A-7	478	478**
95	PTO-A-7	642	642

**The transcript, in what appears to be an error, speaks of Exhibit 25 as being here admitted; but the context makes it clear that Exhibit 94 was intended instead.

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
96	PTO-A-7	1291	1292
97	PTO-A-7	638	638
98	PTO-A-7	2026	2026
99	PTO-A-7	2026	2026
100	PTO-A-7	3045	3045
101	PTO-A-7	3063	3063
102	PTO-A-7	1291	1292
103	PTO-A-7	3063	3063
104	PTO-A-7	3063	3063
105	PTO-A-7	3158	3158
106	PTO-A-8	3162	3162
107	PTO-A-8	3159	3160
108	PTO-A-8	3165	3165
109	PTO-A-8	3167	3167
110	PTO-A-8	3167	3168
113	PTO-A-8	1896	1896
114	PTO-A-8	2031	2031
117	PTO-A-8	654	654
118	PTO-A-8	1876	1876
119	PTO-A-9	1877	1877
120	PTO-A-9	1877	1877
121	344	344	345
122	458	458	459
123	776	776	777
124	969	971	971
125	1108	1110	1111
126	1121	1121	1578
127	1583	1584	1584
128	1591	1598	1598
129	1598	1598	1598
130	1741	1741	1742
301	PTO-C-1	1291	1292
302	PTO-C-1	1150	1151

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
303	PTO-C-1	1157	1157
304	PTO-C-1	1291	1292
305	PTO-C-1	1291	1292
306	PTO-C-1	1291	1292
307	PTO-C-1	1212	1212
308	PTO-C-1	1291	1292
309	PTO-C-1	1291	1292
310	PTO-C-1	1291	1292
311	PTO-C-1	1291	1292
312	PTO-C-1	1291	1292
313	PTO-C-1	1291	1292
314	PTO-C-1	1291	1292
315	PTO-C-1	1291	1292
316	PTO-C-1	1291	1292
317	PTO-C-1	1291	1292
318	PTO-C-1	1291	1292
319	PTO-C-1	1291	1292
320	PTO-C-1	1291	1292
321	PTO-C-2	1291	1292
322	PTO-C-2	1291	1292
323	PTO-C-2	1212	1212
324	PTO-C-2	1291	1292
325	PTO-C-2	1291	1292
326	PTO-C-2	1212	1212
327	PTO-C-2	1212	1212
328	PTO-C-2	1212	1212
329	PTO-C-2	1291	1292
330	PTO-C-2	1212	1212
331	PTO-C-2	1291	1292
332	PTO-C-2	1291	1292
333	PTO-C-2	1291	1292
334	PTO-C-2	1212	1212
335	PTO-C-2	1212	1212

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
336	PTO-C-2	1291	1292
337	PTO-C-2	1291	1292
338	PTO-C-2	1291	1292
339	PTO-C-2	1212	1212
340	PTO-C-2	1212	1212
341	PTO-C-2	1212	1212
342	PTO-C-3	1212	1212
343	PTO-C-3	359	360
344	PTO-C-3	1212	1212
345	PTO-C-3	1212	1212
346	PTO-C-3	367	368
347	PTO-C-3	367	368
348	PTO-C-3	367	368
349	PTO-C-3	1291	1292
350	PTO-C-3	1291	1292
351	PTO-C-3	1291	1292
352	PTO-C-3	1291	1292
353	PTO-C-3	1291	1292
354	PTO-C-3	1291	1292
355	PTO-C-3	1291	1292
356	PTO-C-3	1212	1212
357	PTO-C-3	1212	1212
358	PTO-C-3	1212	1212
359	PTO-C-3	1212	1212
360	PTO-C-3	1212	1212
361	PTO-C-3	1212	1212
362	PTO-C-4	1291	1292
363	PTO-C-4	1291	1292
364	PTO-C-4	1212	1212
365	PTO-C-4	1212	1212
366	PTO-C-4	1291	1292
367	PTO-C-4	1291	1292
368	PTO-C-4	1212	1212

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
369	PTO-C-4	1212	1212
370	PTO-C-4	1291	1292
371	PTO-C-4	1291	1292
372	PTO-C-4	1291	1292
373	PTO-C-4	1291	1292
374	PTO-C-4	1212	1212
375	PTO-C-4	1212	1212
376	PTO-C-4	1212	1212
377	PTO-C-4	1291	1292
378	PTO-C-4	1291	1292
379	PTO-C-4	1291	1292
380	PTO-C-4	619	619
381	PTO-C-5	2334	2334
382	PTO-C-5	410	410
383	PTO-C-5	1291	1292
384	PTO-C-5	2028	2028
385	PTO-C-5	2028	2028
386	PTO-C-5	437	438
387	PTO-C-5	437	438
387-A	1263	2028	2028
388	PTO-C-5	437	438
389	PTO-C-5	437	438
390	PTO-C-5	2028	2028
391	PTO-C-5	461	461
392	PTO-C-5	2029	2029
393	PTO-C-5	445	445
394	PTO-C-5	1212	1212
395	PTO-C-5	1212	1212
396	PTO-C-5	1212	1212
397	PTO-C-5	1212	1212
398	PTO-C-5	1291	1292
399	PTO-C-6	1291	1292
400	PTO-C-6	1291	1292

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
401	PTO-C-6	1212	1212
402	PTO-C-6	1212	1212
403	PTO-C-6	1212	1212
404	PTO-C-6	470	470
405	PTO-C-6	1212	1212
406	PTO-C-6	1212	1212
407	PTO-C-6	1291	1292
408	PTO-C-6	1212	1212
409	PTO-C-6	1212	1212
410	PTO-C-6	1212	1212
411	PTO-C-6	1212	1212
412	PTO-C-6	1212	1212
413	PTO-C-6	1291	1292
414	PTO-C-6	1212	1212
415	PTO-C-6	1291	1292
416	PTO-C-6	1212	1212
417	PTO-C-6	2296	2296
418	PTO-C-6	2265	2265
419	PTO-C-7	2545	2545
420	PTO-C-7	2553	2553
421	PTO-C-7	2553	2553
423	PTO-C-7	1212	1212
433-A	570	571	571
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433-C	575	576	576
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501	PTO-B-1	329	330
502	PTO-B-1	333	334
503	PTO-B-1	332	332
504	PTO-B-1	431	431
505	PTO-B-1	531	531
506	PTO-B-1	355	355
508	PTO-B-1	1176	1176
509	PTO-B-1	369	369
510	PTO-B-1	369	369
511	PTO-B-1	369	369
512	PTO-B-1	370	370
513	PTO-B-1	390	390
514	PTO-B-1	407	407
515	PTO-B-2	2453	2454
516	PTO-B-2	559	559
517	PTO-B-2	458	458
518	PTO-B-2	456	456
519	PTO-B-2	463	463
520	PTO-B-2	464	464
522	PTO-B-2	2510	2510
523	PTO-B-2	471	471
524	PTO-B-2	473	473
525	PTO-B-2	475	475
526	PTO-B-2	473	473
527	PTO-B-2	474	474
528	PTO-B-2	2025	2025
529	PTO-B-2	431	431
530	PTO-B-2	402	402
531	PTO-B-3	402	402
532	PTO-B-3	478	478

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
533	PTO-B-3	630	630
534	PTO-B-3	2026	2026
535	PTO-B-3	1212	1212
536	PTO-B-3	1212	1212
537	PTO-B-3	1212	1212
538	PTO-B-3	1291	1291
539	PTO-B-3	1291	1291
540	PTO-B-3	1167	1168
541	PTO-B-3	1291	1292
542	PTO-B-3	1212	1212
543	PTO-B-3	1212	1212
544	PTO-B-3	1212	1212
545	PTO-B-3	1291	1291
546	PTO-B-4	1212	1212
547	PTO-B-4	1212	1212
548	PTO-B-4	2025	2025
549	PTO-B-4	642	642
550	PTO-B-4	1291	1292
551	PTO-B-4	1291	1292
552	PTO-B-4	2026	2026
553	PTO-B-4	638	638
554	PTO-B-4	447	447
555	PTO-B-4	2934	2934
556	PTO-B-4	2942	2942
557	PTO-B-4	2951	2951
558	PTO-B-4	2956	2956
559	PTO-B-4	2960	2961
560	PTO-B-4	2963	2963
561	PTO-B-4	2982	2982
562	PTO-B-5	2983	2983
564	PTO-B-5	1882 (in part)	1882 (in part)

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
576	PTO-B-5	1352	1352
578	PTO-B-5	3045	3045
579	PTO-B-6	3063	3063
580	PTO-B-6	3072	3072
581	PTO-B-6	3115	3115
582	PTO-B-6	3130	3130
583	PTO-B-6	3130	3130
584	PTO-B-6	3131	3131
585	PTO-B-6	3132	3132
586	PTO-B-6	3151	3152
587	PTO-B-6	3045	3045
588	PTO-B-6	2031	2031
589	PTO-B-6	3063	3063
590	PTO-B-6	3063	3063
596	PTO-B-7	2031	2031
600	PTO-B-7	1584	1584
623	PTO-B-8	654	654
629	PTO-B-9	2034	2034
630	PTO-B-9	1979	1979
631	PTO-B-9	1979	1979
632	PTO-B-9	1979	1979
634	PTO-B-9	895	895
636	PTO-B-9	895	895
637	PTO-B-10	895	895
638	PTO-B-10	1944	1944
639	PTO-B-10	1944	1944
642	PTO-B-10	1944	1944
647	PTO-B-10	1944	1944
649	PTO-B-10	1979	1979
650	PTO-B-10	1896	1896
653	PTO-B-11	2001	2001
654	PTO-B-11	2001	2001

<u>Number</u>	<u>Page of Record Where Identified</u>	<u>Page of Record Where Offered In Evidence</u>	<u>Page of Record Where Admitted Into Evidence</u>
655	PTO-B-11	2033	2033
692	PTO-B-13	2031	2031
697	PTO-B-14	2034	2034
698	PTO-B-14	2034	2034
699	PTO-B-14	2034	2034
700	PTO-B-14	2034	2034
701	PTO-B-14	761	762
702	PTO-B-14	1280	1280
703	785	784	785

No. 15669

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY JOSEPH,

Appellant,

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN and M. H. WYMAN,

Appellees.

PETITION FOR REHEARING.

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FILED

DEC 19 1958

PAUL P. O'BRIEN, CLERK

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Appellees.

PETITION FOR REHEARING.

Statement of Grounds for Petition for Rehearing.

This petition for rehearing by appellant is upon the following grounds:

1. Appellant respectfully submits that this Court erred in its original opinion herein in not considering as controlling or vital the admissions of appellees. It was upon these astonishing and decisive admissions that this appeal was founded and taken; yet the original opinion is principally devoted to the infinitely less important question of the express conversations of the evening of November

18, 1952. Indeed, it refers to the question of the reaching of an express agreement on that date as the "very heart of the case" (Slip Opin. p. 8).

2. Appellant further submits that this Court erred in its original opinion herein in fixing and employing a far more rigid standard of proof for existence of joint venture than that employed by the Oregon law which ought properly to be followed by the Federal courts in this cause based upon diversity of citizenship. (For convenience, the first and second point will be argued together.)

3. Finally, appellant urges that the general and Oregon law requires that such an opportunity as plaintiff here disclosed to defendant O'Donnell for mutual investment not be wrested away from plaintiff against his will; and that the law requires this even aside from and regardless of the proved intent of the parties to enter into the deal together.

I and II.

This Court Is Asked to Reconsider the Erroneous Factual and Legal Basis of Its First Opinion Herein.

To speak plainly, we feel and urge that this Court focussed too sharply both at the time of oral argument and in its opinion, upon a small aspect of this case, to the almost complete exclusion of the more important parts.

As the writer of these particular words, counsel Lawrence Steinberg, believes, he has been at fault in this regard because, having failed despite specific advance motion to secure the additional time required to argue this complex case, he failed to force the course of oral argument away from the narrow topic of the conversation of November 18, 1952. This topic occupied the attention and

questions of the Court on oral argument to a very high degree. Said counsel was thus unable to place before the Court on oral argument either the large factual charts or the oral presentation which formed the true basis of appellant's cause. These were directed to the total conduct of the parties before and after November 18, 1952, and to the controlling judicial admissions contained in the testimony of appellees themselves.

The written opinion speaks incorrectly of the testimony as to the conversation of November 18, 1952, as being "the very heart of the case" (Slip Opin. p. 8). It then goes on to say that the trial Court did not need to agree with Joseph's version of the conversation.

Let us assume here, for discussion, that the Court was correct in its conclusions as to the force of the evidence concerning that conversation. (In point of fact, we think that the zig-zag path through amnesia and untruthfulness of Chinn and O'Donnell, covered for example at pp. 61-65 of App. Op. Br., together with inability to make any denial of Joseph's testimony, graphically affirm Joseph's testimony; but we pass that point here.) Even if the conversation be held to be as O'Donnell wishes, appellant's position of strength on this appeal is unaffected.

For this Court's opinion, going beyond the single conversation, deals most limitedly with review of the findings. Appellant's case for conduct and admissions as establishing joint venture is regarded as countered simply by the trial Court's finding that the conduct of the parties after November 18, 1952, did not prove the necessary agreement.

Yet is not the question here simply this—does a detailed factual examination on the whole record of the basis for such findings, if there be a basis, support the view that

the finding is other than clearly erroneous? (Preliminarily, we ask the court to note the striking paucity of supporting citations to this finding by appellees in their Appx., pp. 48-49).

Finding XIII, and sub-paragraph 3 thereof especially cited in the Court's opinion (Slip Opin. p. 5), is conclusionary in character and cannot successfully float in the air, lacking foundation and support.

We regret very strongly that the Court did not in its opinion deal in detail with the question of the factual support, or lack of it, for the finding that *conduct* of the parties did not prove an agreement and existence of a fiduciary relationship. We urge that detailed factual examination of this question, of basic admission of appellees, and of the absence of support for the finding, would lead the Court to a broad consideration of the issues raised by this case, and to an opposite result.

The evidence, and the very findings of the trial Court itself (insofar as they relate to really factual rather than conclusionary matters), leads inevitably to the view that the conclusionary finding and conclusions of law based thereon are clearly erroneous and unsupported.

While legal principles are also called into play, this case is in certain senses profoundly factual. Determination of the question whether findings are clearly erroneous must necessarily depend upon actual examination of large numbers of facts in the record. Fortunately, this is rendered much easier in the instant case by the fact that so many vital facts are clear and undisputed—even, often, stated as findings of fact by the trial Court itself.

In our Petition for Rehearing, we cannot of course go into the full detail of the record, or even of our efforts to summarize it in our earlier briefs. But we wish to

point out some basic, vital and fundamental facts herein which are unchallenged and which leave shattered and destroyed the tenuous fabric of the conclusionary findings herein drawn in favor of defendants, and unfortunately regarded as binding in this Court's original opinion,

* * * * *

Analysis of Certain Cases Cited by This Courts' Original Opinion.

The original opinion of this Court appears to lay heavy stress (Slip Opin. pp. 3-5) on such cases as *Bogle v. Paulson* (1949), 185 Ore. 211, 201 P. 2d 733; *Preston v. State Industrial Acc. Comm'n.* (1944), 174 Ore. 553, 149 P. 2d 957, 960; and *Burnett v. Lemon* (1948), 185 Ore. 54, 199 P. 2d 910.

It is true that not all the seventy-odd cases cited by appellees were specifically covered by appellant in his closing brief. To do so would not only have involved unbearable amounts of detail in that brief, but would have obscured the main and telling point of this case—that the factual admissions of appellees are so striking and conclusive that, under the circumstances of this case, they require reversal under any test of the evidence.

We submit that these three cases are not and cannot be controlling of the case at bar. This case requires to be examined on its own record, in order to show the clearly erroneous character of the basic findings. However, we do now briefly examine into three cases suggested as controlling, in order to show that they are truly inapposite as authorities in the present situation.

The Bogle Case: We submit that the *Bogle* case, despite superficial resemblances to the one at bar, is so strikingly and fundamentally different that it should not and indeed

cannot, serve as any precedent against appellant's position. We set out now some of these differences.

1. In the *Bogle* case, plaintiff's story was inherently unlikely, in that allegedly defendant agreed to take all the loss and accept only one-half the property. The opposite is true here; no inequality was claimed.

2. In the *Bogle* case, the defendant did not mislead the plaintiff, did not suppress information and did not write untruthful letters of purported explanation of his conduct. The opposite is true here.

3. In the *Bogle* case, the defendant was deaf and had a hard time knowing what was said in court, thus excusing the unsatisfactory character of his testimony. The opposite is true here.

4. In the *Bogle* case, there was denial by defendant that the deal was brought to him by plaintiff. Here, the defendant O'Donnell had to admit it.

5. In the *Bogle* case, the parties were truly strangers and not put together by long time associates. The opposite is true here.

6. In the *Bogle* case, there was virtually no corroboration of plaintiff's evidence in any way, nor any genuine admissions by defendant. The opposite is true here.

It was only in the context of such extraordinary and basic differences from the case at bar that the *Bogle* Court, after pointing out that the findings are not binding, and that it was the appellate Court's duty to examine carefully the record for the purpose of determining the truth, affirmed the judgment of the trial Court. Even so, one member of the Court dissented.

The Burnett Case: Similarly, the case of *Burnett v. Lemon* (1948), 185 Ore. 54, 199 P. 2d 910, is basically dissimilar from the one at bar, and cannot be “controlling,” as suggested in the original opinion of this Court (Slip Opin. p. 5).

In the *Burnett* case, there were *no* judicial admissions by the defendants tending to show a partnership in the slightest degree. In the instant case, there are overwhelming judicial admissions by defendants themselves. Indeed, in the *Burnett* case there was virtually no corroboration of plaintiff’s testimony save certain rather vague *extra-judicial* and disputed admissions by defendant. Despite the weak state of the evidence for plaintiff in that case, the Court relied, in finding that plaintiff had not sustained the burden of proof, on the extravagance under the facts there shown of the claim that partnership extended to ownership as well as operation of the ranch involved.

Of course plaintiff bears the burden of showing the agreement and its terms. But we say it is clear that the burden is met by defendants’ own admissions; and under the Oregon cases there is a presumption of equality between the joint venturers unless otherwise shown. This is clear under Oregon law (*Gius v. Coffinberry*, 39 Ore. 414, 65 Pac. 358).

The Preston Case: Likewise, the case of *Preston v. Industrial Acc. Comm’n* (1944), 174 Ore. 533, 149 P. 2d 957, holds and says at most that partnership or joint venture is founded upon voluntary intent of the parties. It may be shown by express or implied agreement; and the Oregon law “. . . will regard . . . conduct rather than . . . language in determining whether . . . voluntary associating in a business enterprise amounts to a partnership or not . . .”

But this is what appellant not only concedes but insists upon; and it does no more than highlight appellant's insistence that we must look at what O'Donnell *did* and *admits* he did—and not alone at what O'Donnell says he does or does not remember of a conversation on November 18, 1952. If this case is decided on O'Donnell's testimony as to that evening alone, and such testimony is regarded as the crux of this case (as suggested at Slip Opin. p. 5), then appellant's position of great strength will have been misunderstood, and an inadvertent but nonetheless grave injustice will be done to appellant and his cause.

When These and Other Admissions of Defendants Are Considered Together, Defendants Stand Condemned From Their Own Faults.

We set out briefly the documentation of some of the truly damning testimonial admissions of defendant O'Donnell (and often, the actual specific findings), which destroy the case of the defendants. This material is set out in far fuller, and somewhat different, fashion in Appellant's Opening Brief, at pages 32 to 55; we earnestly request the Court's renewed attention to that material.

1. O'Donnell, as he testified and as was found, first learned of the entire Kinzua deal through Joseph and Terman [O'Donnell, Tr. 839, 841; Find., IV(3), Tr. 249].

2. O'Donnell first met the seller's agents at Portland through plaintiff, admittedly and as found [O'Donnell, Tr. 879; Find., IV(3), Tr. 249-250].

3. O'Donnell, as he testified and as was found, reported the financial plan of acquisition to Joseph through O'Donnell's lawyer Dunn, to enable plaintiff to interest the Chicago group [O'Donnell, Tr. 1009, 1710-1711; Find., VI(5), Tr. 256].

4. O'Donnell, as he testified himself, discussed the financing of the Kinzua deal with Joseph on a number of occasions; so too the trial Court found [O'Donnell, Tr. 1681, 1742, 1745, 1785-1786; Finds., VI(5), Tr. 256; VII(3), Tr. 258].

5. O'Donnell, as he testified, told the banks he would "take anything he could get" from Chicago [O'Donnell, Tr. 1702]. Indeed, when questioned in testimony as to the source of funds, beyond the share to be raised by his western group, O'Donnell specified Joseph [O'Donnell, Tr. 1813]. O'Donnell also stated that the Chicago group and O'Donnell were to raise whatever each could, and get together to allocate [O'Donnell, Tr. 3555].

6. O'Donnell reported to Joseph in January 1953, that inspection of the properties was to be done later [O'Donnell, Tr. 1807-1811]. He also reported to Joseph in March 1953, and the Court so found, that the preliminary investigation of the Kinzua properties after the winter was favorable, and that he would investigate further [O'Donnell, Tr. 1840-1845; Find., IX(6), Tr. 263]. Yet he never reported back to Joseph, as he admitted himself and as the Court found, until after the purchase of Kinzua was made in August 1953 [Admitted Fact XXIV, R. 159-160; Find., IX(6), Tr. 264].

7. While O'Donnell did freeze out Joseph from Joseph's own deal, he explained (with almost total untruthfulness) his action in so doing, after the event [Exhibit 93, reproduced with comment in App. Op. Br., p. 59; Find. XI(3), Tr. 269].

* * * * *

O'Donnell, then learned of and was introduced into the Kinzua deal through, and only through, Joseph and Terman. He discussed with him, intimately, the financing

and physical aspects. He testified himself that the non-O'Donnell money was to come from Joseph, and that he told bankers he was going to get what he could from Chicago (Joseph's headquarters); and further that his group and Chicago were to raise what each could, and get together to allocate. Yet, he concedes, he took the deal, with nothing for Joseph, and without a word to Joseph that he was doing so.

These are facts, not only undisputed, but judicially admitted by defendant O'Donnell himself, and found for the most part by the trial Court. How then can appellees prevail? It is inconceivable; if these facts and the others discussed at pages 32-55, Appellant's Opening Brief, be regarded and analyzed, appellees must lose.

The Oregon Cases Show That an Appellate Court Is to Reverse a Finding of No Joint Venture on Its Own Independent Judgment Where the Evidence Preponderates in Favor of the Existence of Joint Venture.

The actually relevant Oregon cases, which this Court under applicable principles is to follow on this diversity of citizenship cause, give short shift to the argument of virtual conclusiveness of a trial Court's finding that no joint venture exists.

Thus, in *Buschke v. Dyck* (1952), 197 Ore. 144, 251 P. 2d 873, the Court unhesitatingly reversed a decree dismissing a complaint, after trial, wherein plaintiff sought a partnership accounting. Conduct, the reversing opinion said, rather than language employed, is frequently determinative of the existence of a partnership. Heavy stress was laid on the concept that each case must be determined on its own full evidence and factual circumstances, rather than by analogy with other cases. The fact that another case may have contained evidence preponderating against

existence of a partnership "is of no help to defendant" (p. 149) in the appellate Court's review of a new matter. Reversal is to be had where the evidence strongly preponderates against the trial Court's views; and the weight to be given a trial Court's findings in any case is based largely upon its opportunity to judge credibility by seeing and hearing witnesses. (We point out that in the instant case the judicial admissions of O'Donnell, with findings actually based thereon, require no weighing either).

And again, in *Meads v. Stott* (1951), 193 Ore. 509, 238 P. 2d 256, 239 P. 2d 594, the appellate Court, reversing a trial Court judgment that no partnership existed, stressed that despite the "sharp dispute" (p. 513) in the evidence, it was necessary for the reviewing Court to examine a "variety of facts and circumstances" (p. 534). "We have a responsibility to consider and weigh all facts in the case and to arrive at our own independent conclusion as to where lies the truth" (p. 541).

In both those cases, the Oregon Court emphasized that wherever in such matters the evidence strongly preponderated against the trial Court's findings, reversal should be had.

We submit that precisely this situation exists here, and that there should be reversal here also. Appellant has not in any way assumed the existence of a joint venture agreement; he has shown it by his evidence in the trial Court and his analysis of that evidence in this Court. Appellees have given away their case; they cannot do that and have it too. Conflict on minor matters cannot alter this situation, which is fatal to appellees' cause.

III.

Plaintiff Is Also Entitled to Prevail in That Under the Law Defendants, Regardless of Partnership Intent, Cannot Take From Him His Own Deal, Discovered and Revealed by Him.

Appellant throughout has repeatedly urged that, even regardless of intent, defendants under general and Oregon law cannot possibly be permitted to discover the deal through plaintiff and then to take it for themselves while shutting him out of it. We submit in all earnestness that the Court's original opinion has not dealt with this contention; that the contention has been raised throughout and is correct; and that the Oregon law is fully as protective of plaintiff's rights as would be any other law. (See App. Op. Br., pp. 88-89, 8-11, etc.; App. Clos. Br., pp. 6-8, 34, etc. We will not repeat this argument in detail, but urge it strongly.

Plaintiff came to defendants not to give away the deal; he came to them to enter into it equally with them. Not even the defendants deny that plaintiff wanted to enter into the deal, and as a principal. They urge, quite simply, that they were nonetheless entitled to enter into it apart from him. This is totally wrong, and we submit respectfully that this Court erred in not dealing with the contention and dealing with it favorably to plaintiff.

When we turn to the case of *Fouchek v. Janucek* (1950), 190 Ore. 251, 225 P. 2d 783, we find quoted the same leading case on the duty of the joint adventurer as was cited in our earlier briefs (App. Clos. Br., p. 34)—*Meinhard v. Salmon* (1928), 149 N. Y. 458, 164 N. E. 545.

Further, we find stated there the general and controlling principle that one cannot preempt the opportunity provided by another, and use it for one's own exclusive profit. It made no difference to the reviewing Oregon Court that further negotiations would have to follow to work out the precise pattern of the deal. The Oregon Court there, as this Federal Court following Oregon law should do here, reversed a lower Court judgment against the plaintiff, and sent back the cause for an accounting of what was due to plaintiff.

This cause was not based on the intention of the parties to deal together—indeed, as here, the defendant at least ultimately lost such intention. He was held accountable because, as here, he intended not to be bound, but to deprive plaintiff of his rights. Nor was the reviewing Court shaken by the thought that the opportunity taken by defendant was not a property right with a precise value readily determinable in advance. Whatever its value, the defendant could not freely take it from the one to whom he owed the duty.

Conclusion.

We respectfully submit that the original opinion of this Court does not deal with the principal basis of plaintiff's appeal. Applying controlling Oregon law to the factual situation here involved, we have judicial admissions by defendants and factual findings which require judgment for plaintiff on the existence of a joint venture, despite conclusionary findings purporting to deny such joint venture.

Defendants' admissions themselves necessitate reversal. We are confident that re-examination of the controlling admitted facts will lead this Court to the granting of this Petition for Rehearing and the reversal of the judgment of the trial court.

Respectfully submitted,

PRITZKER, PRITZKER, & CLINTON,
STANFORD CLINTON and
LAWRENCE WILLIAM STEINBERG,
Attorneys for Appellant Harry Joseph.

Certificate of Good Cause.

In the opinion of counsel for plaintiff and petitioner, the within petition for rehearing is well founded; and it is not interposed for delay.

LAWRENCE WILLIAM STEINBERG,
Attorney for Appellant Harry Joseph.

15670 ALSO IN
VOL. 3127
No. 15670 ✓

United States
Court of Appeals
for the Ninth Circuit

NORTHWEST ORIENT AIRLINES, INC.,
Appellant,
vs.

GERALDINE B. GORTER, as Administratrix of
the Estate of John M. Waldrep, Deceased,
Appellee.

Transcript of Record

In Three Volumes

VOLUME I.

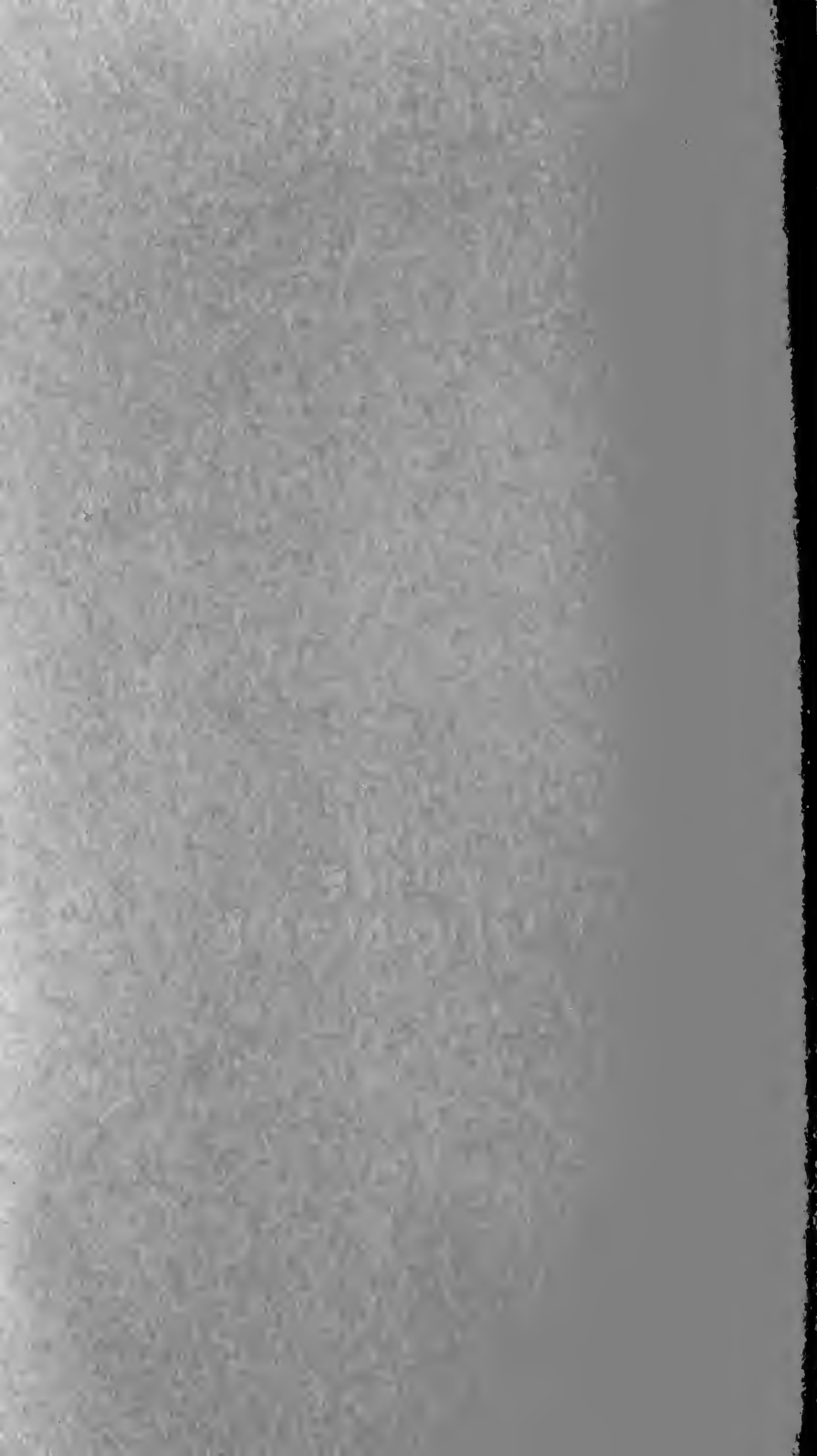
(Pages 1 to 378, inclusive).

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

OCT 31 1957

PAUL P O'BRIEN, CLERK



No. 15670

United States
Court of Appeals
for the Ninth Circuit

NORTHWEST ORIENT AIRLINES, INC.,
Appellant,

vs.

GERALDINE B. GORTER, as Administratrix of
the Estate of John M. Waldrep, Deceased,
Appellee.

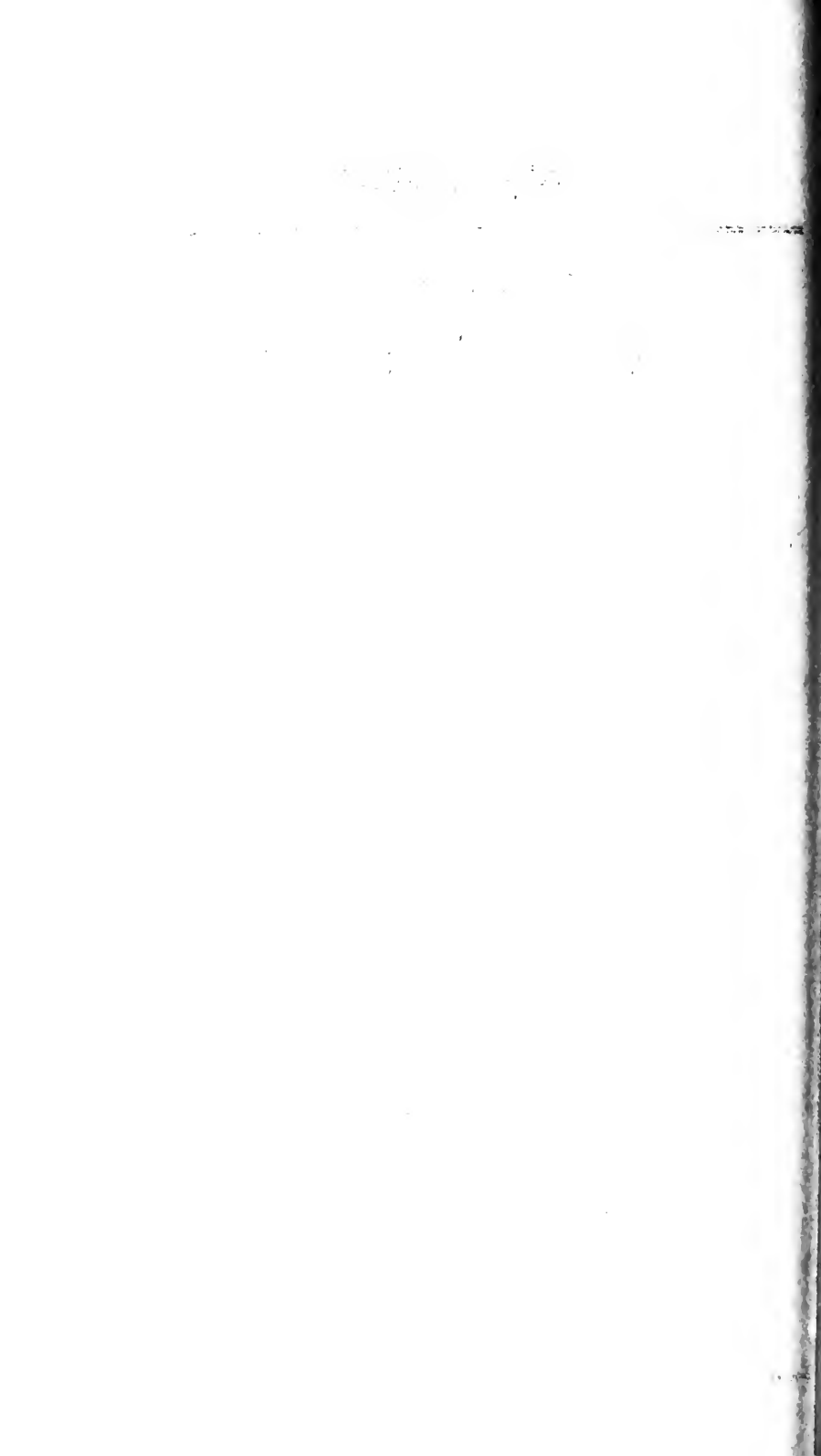
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VOLUME I.

(Pages 1 to 378, inclusive)

Appeal from the United States District Court for the
Western District of Washington,
Northern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, Eastern
District of Washington, Southern Division

No. 883

GERALDINE B. GORTER, Administratrix of the
estate of John M. Waldrep, Deceased,
Plaintiff,

vs.

NORTHWEST AIRLINES, INC., a Minnesota
Corporation, Defendant.

COMPLAINT

Plaintiff complains of defendant, alleging:

First Count

I.

Plaintiff is the duly appointed, qualified, and acting special administratrix of the estate of John M. Waldrep, deceased, and holds special letters of administration issued by the Superior Court of the State of Washington for Walla Walla County, which authorize the commencement and prosecution of this action. Federal jurisdiction is based upon the fact that plaintiff is a citizen of the State of Washington and defendant is a corporation organized and existing under the laws of the State of Minnesota, authorized to do business and doing business in the State of Washington. This is a civil suit involving over \$3,000 exclusive of costs and interest.

II.

On January 19, 1952, John M. Waldrep, a member of the United States armed forces, was a passenger on Northwest Airlines Flight 324, aircraft N-45342, enroute from Japan to McChord Air Force Base, Tacoma, Washington, via Shemya and Anchorage, Alaska.

III.

This flight was undertaken by the defendant, Northwest Airlines, Inc. (hereafter referred to as "Northwest") pursuant to a contract entered into between Northwest and the United States Department of the Air Force on June 30, 1950, for the transportation of Government personnel and equipment.

IV.

Early in the morning of January 19, 1952, while Flight 324 was proceeding from Anchorage, Alaska, to McChord Air Force Base, and was opposite Sitka, Alaska, trouble developed in the No. 1 engine. Owing to a defect in that particular engine, it became necessary to feather the No. 1 propeller and seek a nearby airstrip for the purpose of a precautionary landing. In accordance with company operating procedures in effect at that time, the aircraft captain sought and received clearance from the Air Traffic Route Control (a component part of the United States Civil Aeronautics Administration) to land at the first available airport, which in this instance was Sandspit, British Columbia, rather than continue on the three remaining engines. Sandspit airstrip is designated

by the Civil Aeronautics Board as an emergency airport for Northwest's operations.

V.

At no time, either before or during Flight 324, were the passengers instructed on the use of the life jackets, rubber rafts, or other equipment carried by the aircraft for use in water landings. After trouble developed in No. 1 engine, no effort was made to prepare for a crash landing, or an unpremeditated ditching. As a result, the life jackets, rubber rafts, and other equipment intended for use in such emergencies were not available to the passengers when the aircraft later crashed in the waters of Hecate Strait, as hereafter alleged in paragraph VI.

VI.

In attempting to land at the Sandspit airstrip, the plane crashed less than a mile offshore in the waters of Hecate Strait, British Columbia. The decedent herein perished, as the plaintiff believes and alleges, as a result of drowning in the near-freezing waters, before a rescue could be effected. Plaintiff believes and alleges that, but for the negligence of the defendant as above alleged in paragraph V, the decedent would have survived.

VII.

The No. 1 engine of aircraft N-45342 had, at the time of the accident, been operated in excess of the overhaul time period of 1500 hours prescribed by regulations of the Civil Aeronautics Board. This

engine was leased by Northwest from Trans World Airlines, Inc., which shipped it to Northwest's Seattle, Washington, base on October 21, 1951. The Northwest base at Seattle was advised at that time by TWA as to the number of hours which had elapsed since the engine had been overhauled, but as the result of the negligence of Northwest's Seattle personnel, this critical information was never recorded or evaluated. Consequently, when the engine was eventually installed in the aircraft N-45342, it had accumulated more than 225 hours in excess of the 1500 hours allowed between overhauls.

VIII.

As the result of defendant's negligence in the State of Washington and elsewhere in allowing an engine to be installed in aircraft N-45342, which engine had exceeded the required overhaul time period, Flight 324, on which the decedent was a passenger, crashed at Sandspit, British Columbia, airstrip on January 19, 1952, causing the death of decedent.

IX.

Plaintiff brings this action on behalf of the decedent's surviving daughter, Judith Ann Waldrep, age two (there being no surviving spouse), pursuant to paragraph 4.20.010 of the Revised Code of the State of Washington and claims of the defendant damages in the amount of \$100,000.00 for said wrongful death.

Second Count

X.

The allegation of jurisdiction of paragraph I is adopted herewith.

XI.

The whole of paragraphs I, II, III, IV, V, VI, and VII of the First Count are adopted as fully as if specifically repeated herein.

XII.

Sandspit, British Columbia, constituted an agreed stopping place within the meaning of Article 1(2) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 (hereafter called the "Warsaw Convention"). Accordingly, the flight on which decedent died was in "international transportation" within the purview of Article 1(2) of the Warsaw Convention and therefore subject to the provisions of that Convention.

XIII.

Defendant accepted the decedent on this flight as a passenger without a passenger ticket having been delivered within the meaning of Article 3(2) of the Warsaw Convention.

XIV.

The negligence of the defendant in operating No. 1 engine in excess of the overhaul time period of 1500 hours prescribed by regulations of the Civil Aeronautics Board caused the death of decedent and constituted willful misconduct, or such default

as, in accordance with the law of this Court, is considered to be equivalent to willful misconduct.

XV.

This Court is the court at the place of destination of the flight within the meaning of Article 28(1) of the Warsaw Convention.

XVI.

Plaintiff brings this action pursuant to Article 17 of the Warsaw Convention, and claims of the defendant damages in the amount of \$50,000 for said wrongful death.

Third Count

XVII.

The allegation of jurisdiction of paragraph I is adopted herewith.

XVIII.

The whole of paragraphs I, II, III, IV, V, VI, and VII of the First Count are adopted as fully as if specifically repeated herein.

XIX.

The defendant's obligation under the contract with the United States Government to transport certain personnel, including the decedent herein, included the obligation to decedent to provide him safe passage from Tokyo, Japan, to **McChord Air Force Base**, Seattle, Washington.

XX.

The defendant's obligation under said contract

also included the obligation to decedent to furnish, maintain, and operate aircraft in accordance with appropriate and applicable Civil Aeronautics Regulations.

XXI.

The defendant breached its obligations to the decedent under the said contract, thereby causing his death.

Wherefore, plaintiff demands judgment against defendant as follows:

First Count

1. Damages in the amount of \$100,000.00 and costs; or in the alternative,

Second Count

1. Damages in the amount of \$50,000 and costs; or in the alternative,

Third Count

1. Damages in the amount of \$50,000 and costs.

/s/ CHARLES F. LUCE,
FOWLER, LEVA, HAWES &
SYMINGTON,
HOYT M. ELLIOTT,

Attorneys for Plaintiff

[Endorsed]: Filed Jan. 18, 1954. Stanley D. Taylor, Clerk. Filed Apr. 22, 1954. Millard P. Thomas, Clerk.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM

Defendant moves the court as follows:

For an Order dismissing this action because the complaint fails to state a claim against defendant upon which relief can be granted.

First Count: Does not state a claim upon which relief can be granted because it admits that the accident occurred in British Columbia, and that the decedent, John M. Waldrep, drowned there. The general rule is well established that the place of the wrong is the state or country where the last event necessary to make an actor liable for an alleged tort takes place. The underlying reason for habitually designating the place of the harmful effect is that under the common law a tort consists of a series of events, the cumulative effect of which is to create liability. Conduct and a force set in motion thereby do not of themselves do this, since ordinarily there is no liability until the force has injurious effect.

Authorities to this effect are: Restatement, Conflicts of Law, Sec. 377; *Cameron vs. Vandergriff*, (Ark.) 13 S.W. 1092 (1890). *Alabama & G.S.R. Co. vs. Carroll*, (Ala.), 11 So. 803, 18 L.R.A. 433 (1892). *Otey vs. Midland Valley R. R. Co.*, (Kan.), 197 Pac. 203 (1921). *Le Forest vs. Tolman*, (Mass.), 19 Am. Rep. 400 (1875). *Loucks vs. Stan-*

dard Oil Co., (N. Y.), 120 N.E. 198 (1918). Stumberg, *Conflicts of Law*, 1937 Ed.

It necessarily follows that plaintiff's rights are prescribed by the controlling laws and statutes of British Columbia, Canada. Tort actions do not survive at common law, and recovery cannot be predicated upon the Washington Wrongful Death Statute, Paragraph 4.20.010, Revised Code of Washington, relied upon by plaintiff, such statute being in derogation of the common law.

Count Two: Does not state a claim upon which relief can be granted because the Warsaw Convention has never been ratified by and is not in force as to Japan. Chapter 1, Article 1, Paragraph (2) of the Warsaw Convention defines transportation as:

“* * * (A)ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party shall not be

deemed to be international for the purposes of this Convention.”

Since Japan has not ratified the treaty, it is not a “High Contracting Party”. The place of departure and the place of destination were not within the territories of two “High Contracting Parties”. The transportation departed from the territory of a non-contracting party. The place of destination was a point within the territory of a “High Contracting Party”, the United States. The only agreed stopping places were at Shemya, in the Aleutian Islands, and Anchorage, both within United States Territory. This is acknowledged by Paragraph II of the complaint. Paragraph IV of the complaint acknowledges that defendant received clearance from the Air Traffic Route Control, a component of the U. S. Civil Aeronautics Administration, to make an emergency landing at Sandspit, British Columbia. This was not an agreed stopping place, but rather was a stop made necessary by circumstances that developed long after the flight was planned and undertaken. The flight as planned and undertaken did not include provision for the emergency landing which was attempted. It should be observed further that the flight did not land at Sandspit. The pilot, after attempting a landing, changed his mind and continued the flight. The plane did not gain sufficient altitude and plunged into the water of Hecate Strait, some distance from the Sandspit airfield. It follows, then, that this flight was not one subject to the provisions of the Warsaw Convention.

Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) 49 Stat. 3000.

Count Three: Does not state a claim upon which relief can be granted because of failure to join an indispensable party, and because a tort action is set up and such action does not survive at common law.

(1) Failure to Join an Indispensable Party. The complaint alleges that plaintiff is a Special Administratrix of the estate of the decedent and authorized by the Walla Walla County Superior Court to prosecute this action; that the spouse of John M. Waldrep is now deceased, and that Judith Ann Waldrep, aged two years, is the surviving daughter of the aforescribed deceased parents. No foreign law is pleaded, so it may be presumed that the law of a domicile of the deceased parents and the surviving child is the same as the law of the forum. It appears from the face of the complaint that John M. Waldrep was survived by his wife, because it is alleged that the daughter is now two years old and the accident in which John M. Waldrep drowned occurred more than two years ago. If the action is based on contract, it would survive under the provisions of RCW 4.20.040 and would not be a wrongful death action, the right to which is created by RCW 4.20.010. The marital community, composed of John M. Waldrep and his wife, terminated on Waldrep's death. When Mrs. Waldrep died her personal representative and this plaintiff, the personal representative of

John M. Waldrep, owned this right of action, based on contract, as tenants in common, and their minor daughter had an interest therein which must be represented by a duly appointed, qualified, and acting guardian ad litem. One tenant in common cannot bring an action to recover property so held, without either joining the other tenant in common as a plaintiff or a defendant. An action on contract cannot be maintained by one tenant in common, as is attempted here, without making the other tenant in common, and others having an interest in the subject matter, including the guardian ad litem of Judith Ann Waldrep, either parties plaintiff or defendant.

(2) A Tort is Set Up and a Tort Action Does Not Survive the Common Law. In reality, although this count is couched in contract language, it is obvious that liability, if any, will be predicated on proof of negligence. In fact, it is alleged in Paragraph XIX, Page 5, of the complaint, that defendant had the obligation to provide decedent with safe passage, and in Paragraph X, Page 5, that defendant's obligation included the obligation to furnish, maintain and operate aircraft in accordance with applicable Civil Aeronautics Regulations. Where the basis of a cause of action is an alleged breach of a duty through negligence, the action is governed by the applicable law of torts, even though the allegations refer to a breach of contract. Under the applicable law of torts, the law of British Columbia applies, the tort action does not survive, and the wrongful death action created by

the statute in derogation of the common law by the legislature of the State of Washington is inapplicable.

The preceding arguments made with reference to Count One become relevant here.

Maynard vs. Eastern Airlines, Inc., (C.C.A. 2) 178 F. 139, and cases there cited.

Restatement, Conflicts of Laws, Section 391.

/s/ CARL G. KOCH,
KARR, TUTTLE & CAMPBELL,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 9, 1954. Stanley D. Taylor, Clerk. Filed Apr. 22, 1954. Millard P. Thomas, Clerk.

[Title of District Court and Cause.]

ORDER CHANGING VENUE

This matter having come on regularly to be heard this 6th day of April, 1954, before the undersigned Judge of the above entitled court, plaintiff being represented by Charles F. Luce of Tuttle and Luce, Walla Walla, Washington, her attorneys, and the defendant being represented by Carl G. Koch of Karr, Tuttle & Campbell of Seattle, Washington, its attorneys, and the court having heard the arguments of counsel, and having examined the records and files herein, and being fully advised in the premises, now therefore, it is hereby

Ordered that defendant be and is hereby permitted to withdraw its motion heretofore made for change of venue to the United States District Court for the Western District of Washington, Northern Division, and it is further

Ordered that plaintiff's oral motion made in open court for change of venue to the United States District Court for the Western District of Washington, Northern Division on the ground that it would be for the convenience of parties and witnesses be *and* in the interests of justice, and the same is hereby granted, and it is further

Ordered that such change of venue shall be without prejudice to the right of the defendant to present for determination to the United States District Court for the Western District of Washington, Northern Division its motions heretofore filed entitled Motion to Dismiss Complaint for Failure to State a Claim; Motion to Dismiss Count Two of Complaint for Lack of Jurisdiction over the Subject Matter; Motion to Dismiss for Lack of Jurisdiction over the Defendant; Motion to Quash for Insufficiency of Service of Process, and it is further

Ordered that defendant's motion to dismiss count two of the complaint on the ground that the United States District Court for the Eastern District of Washington, Southern Division does not have jurisdiction over the subject matter is preserved, is not waived, and may be presented for determination to the United States District Court for the Western District of Washington,

Northern Division, notwithstanding the fact that venue has been changed by this order to the United States District Court in which defendant alleges that plaintiff's action should have been commenced.

Done in Open Court this 20th day of April, 1954.

/s/ SAM M. DRIVER,

United States District Judge for the Eastern District of Washington, Southern Division.

Presented by:

CARL G. KOCH, of Karr, Tuttle & Campbell,
Attorneys for Defendant.

Certification attached.

[Endorsed]: Filed April 20, 1954, Stanley D. Taylor, Clerk. Filed April 22, 1954, Millard P. Thomas, Clerk.

In the District Court of the United States, Western District of Washington, Northern Division

Civil Action No. 3695

GERALDINE B. GORTER, Administratrix of the
estate of John M. Waldrep, Deceased,
Plaintiff,

vs.

NORTHWEST AIRLINES, INC., a Minnesota
Corporation, Defendant.

MEMORANDUM OF AUTHORITIES IN OP-
POSITION TO DEFENDANT'S MOTION
TO DISMISS

It is plaintiff's position that the Complaint

herein does state a claim upon which relief can be granted for the reasons as hereinafter set out.

Count One

Paragraphs VII and VIII of plaintiff's First Count alleges negligent acts of the defendant which occurred in the State of Washington. Defendant's Motion gives rise to the following question.

Where an American serviceman under military orders is flying as a passenger in an American airliner under contract with the United States, and he is killed as a result of the airline's negligence committed in the United States, but by fortuitous events the crash occurs in a foreign country, is the serviceman's right of recovery against the airline to be measured by the law of the foreign country where the crash happened to occur.

The Wrongful Death Statute of the State of Washington, RCW 4.20.010 provides:

"When the death of a person is caused by the wrongful act, neglect, or default of another, his personal representative may maintain an action for damages against the person causing the death; * * *"

This statute creates a cause of action unknown to the common law and the rules of common law relative to the locus of a tort need not necessarily be applied in construing this statute.

Mike vs. Lian, 322 Pa. 353, 185 A 775 (1936).

Hoodmacher vs. Lehigh Valley R. Co. 66A. 975 (Penn. 1907).

It should be pointed out that in Mike vs. Lian,

supra, the court at page 777, in pointing out the distinction between a suit at common law for personal injury and a suit under a wrongful death statute said:

“As these cases concern themselves with a statutory cause of action for death, they are susceptible to the application of a different principle from that governing the ordinary common law trespass, although it is not meant to be asserted here that a different principle should apply. In the statutory death action, there is a possibility of fixing the place of the wrong by any one of three incidents, namely, the place of negligence, place of injury, or the place of death.”

In construing the wrongful death statute above it is evident that the legislature did not require that the death occur in the State of Washington. The statute provides for a cause of action when a wrongful act, neglect or default causes the death of another. The statute is phrased in terms of acts or lack thereof and by its terms it does not require that the wrongful acts result in an impact in the State of Washington. In the instant case acts of negligence on defendant's part did occur in the State of Washington resulting in the death of the decedent in Canada. We are not aware of a decision in the Courts of this State holding that under these circumstances a cause of action cannot be maintained under the Washington Wrongful Death statute.

Since this is then a case of first impression it is therefore in order for the Court to examine

relevant policy consideration, since conflicts of law are ultimately based upon such considerations. The policy considerations favoring the application of domestic law are:

1. Since no foreign parties or interests are involved, there is no need to apply the principle of comity in order to do justice between the parties.

2. A serviceman is not abroad of his own free will, but because of military orders issued by the United States Government.

3. Convenience and certainty: Our servicemen are being transported under military orders by domestic carriers all over the world; to apply the law of remote foreign nations to such cases would be difficult, confusing and uncertain.

4. Wrongful death actions are statutory, and the rules of the common law need not necessarily be applied.

Defendant apparently takes the position that the place of death is controlling as to the law to be applied and that the laws of the place where the negligent acts occurred is not to be considered. However, there are cases holding that the applicable law is the law of the locus of the cause of the injury rather than the law of the locus of the injury itself.

For instance see, *Lindstrom vs. International Nav. Co.* 117 Fed. 170 (C.C. E.D. New York 1902) Reversed on other grounds 123 F 475 (CCA 2nd D), Writ of Certiorari denied in 193 U.S. 669, where the Court held in a wrongful death suit that the tortious act occurred on board ship and there-

fore the law of New York applied. In this case the tortious acts were committed on board ship resulting in the death of the decedent by drowning after she was swept overboard by a wave. The Court refused to follow defendant's contention that since the death occurred by drowning the tortious act was committed on the ocean and the law of New York did not apply.

Likewise the Supreme Court of the State of Washington has had occasion to rule upon a similar point. In *Scott vs. Department of Labor and Industries*, 130 Wash. 598, 28 Pac. 1013 (1924) a workman was standing on a hopper and platform, which was a part of the dock, and when the hopper and platform were tipped over it caused the workman to fall, and he was injured when he struck the deck of a vessel below. The appellant argued that the injury was a matter of admiralty jurisdiction and did not come under the jurisdiction of the State court and the Washington Workman's Compensation Laws. The basis of the appellant's contention was that jurisdiction was determined by the locus of the injury, i.e., the ship deck, and not the locus of the cause of the injury, i.e., the dock. However, the Washington Court even though conceding that the injury was sustained by striking the deck of the ship, refused to follow appellant's contention and applied the Workman's Compensation Laws of the State of Washington.

However, even if the Court conceives that it should apply the law of British Columbia, Canada, this would not be grounds for dismissal of Count

One. The law of British Columbia, Canada, not being pleaded it is presumed that the law of British Columbia, Canada, is the same as the law of the State of Washington. This presumption goes as well to the statute law of Canada as it does to the common law.

Fletcher vs. Murray Commercial Co., 72 Wash. 525, 130 Pac. 1140 (1913).

Pitt vs. Little, 58 Wash. 355, 108 Pac. 941 (1910).

Daniel vs. Gold Hill Mining Co., 28 Wash. 411 (1902).

The Hanna Nielson, 25 F. (2d) 984 (1902) (D.C. Wash. W.D. 1928).

Count Two

The objections raised by the defendant to Count Two are questions of fact which should be raised by defendant as a matter of defense. The questions that would probably be raised under a proper pleading are, *inter alia*:

(1) Has Japan ratified the Treaty so as to become a "High Contracting Party" within the meaning of the Warsaw Convention and Chapter I, Article 1, thereof.

(2) If Japan is not a "High Contracting Party", does the occupation of that country by the United States mean that the flight departed from "territories subject to the sovereignty, suzerainty, mandate, or authority of" the United States within the meaning of Chapter I, Article 1 (2) of the

Warsaw Convention on International Air Transportation.

(3) Paragraph XIII of the Second Count alleges that no passenger ticket was delivered to the deceased. Therefore, the only contract controlling the place of departure is the contract alleged in paragraph III of Count One between the United States and the defendant, providing for the services of the latter in furnishing transportation on a mileage basis. This contract does not specify any place of departure. This being the case the question is raised as to whether the place of departure is Alaska or Japan.

(4) If Japan is not a "High Contracting Party" but the flight departed from territories subject to the sovereignty, suzerainty, mandate, or authority of the United States", then was Sandspit, British Columbia, an agreed stopping place within the meaning of Chapter I, Article 1, of the Warsaw Convention on International Air Transportation.

It is apparent that the foregoing questions raise substantial questions of fact which can only be disposed of by evidence introduced pursuant to a proper pleading of the cause.

Count Three

Defendant's argument for dismissal of Count Three is based upon the assumption that the face of the Complaint shows that John M. Waldrep was survived by his wife since the death of John M. Waldrep occurred more than two years ago, but the surviving child is only two years old. How-

ever, defendant's assumption is not warranted by the Complaint. The record indicates that the Complaint was subscribed on or before January 18, 1954, and at that date the surviving child was two years old. The death of John M. Waldrep occurred on January 19, 1952, or less than two years from the date the Complaint was subscribed, so it cannot be assumed that the wife of John M. Waldrep survived him.

Furthermore, even assuming that John M. Waldrep was survived by a widow there is no defect in party plaintiff. Under the law of the State of Washington, upon the death of one spouse the entire community estate is subject to probate.

Crowe & Co. vs. Adkinson Const. Co., 67 Wash. 420, 121 Pac. 841 (1912).

Gillam vs. City of Centralia, 14 Wn. (2d) 523, 128 P. (2d) 661 (1942).

Furthermore, under RCW 11.48.090 it is provided all actions on contract may be brought by the executor in all cases in which the action might have been maintainable by the testator. Count Three is a contract action and as community property it forms a part of the estate of the deceased and as held in *Belt vs. Washington Water Power Company*, 24 Wash. 387, 64 Pac. 525 (1901) it is an action which would have been maintainable by the deceased without joining his wife as party plaintiff. Therefore this is an action maintainable by the administratrix without joinder of the surviving spouse.

Respectfully submitted,

/s/ RAYMOND C. SWANSON,
RYAN, ASKREN & MATHEWSON,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause.]

ORDER OVERRULING MOTION TO DISMISS AND QUASH

This Matter, having come on to be heard this day before the undersigned Judge of the above-entitled Court, pursuant to the motions of the defendant, and the plaintiff being present by her attorneys, Ryan, Askren & Mathewson, and the defendant not being present but defendant's attorneys, Karr, Tuttle & Campbell, having heretofore approved the entry of this Order as to its form, and the Court having heard oral argument on the 16th day of May, 1955, and written memoranda having been filed herein and the Court being otherwise advised in the premises, Does Hereby:

Order, Adjudge and Decree, that the defendant's Motion to Dismiss Complaint for Failure to State a Claim, Motion to Dismiss Count Two of Complaint for Lack of Jurisdiction Over the Subject Matter, Motion to Dismiss for Lack of Jurisdiction Over the Defendant, and Motion to Quash for Insufficiency of Service of Process, be and

the same hereby are overruled without prejudice to the right to renew at the time of trial and defendants' exceptions hereto are noted and allowed.

Done in open Court this 23rd day of May, 1955.

/s/ JOHN C. BOWEN,
Judge

Presented by:

/s/ RAYMOND C. SWANSON, of Ryan, Askren
& Mathewson, Attorneys for Plaintiff.

Approved as to Form:

/s/ JAMES B. CARROLL, of Karr, Tuttle &
Campbell, Attorneys for Defendant.

[Endorsed]: Filed May 23, 1955.

[Title of District Court and Cause.]

ANSWER

Defendant Northwest Airlines, Inc., above named by its attorneys, Karr, Tuttle & Campbell, for its answer to plaintiff's complaint admits, denies and alleges:

As To First Cause of Action

I.

Defendant denies that plaintiff is the duly appointed, qualified, and acting special or general administratrix of the estate of John M. Waldrep, deceased. Defendant denies that it has any knowledge or information sufficient to form a belief as to any of the remaining allegations contained in Paragraph I of the complaint, except that defend-

ant admits that the Superior Court of the State of Washington for Walla Walla County purported to authorize the commencement and prosecution of this action, that defendant is a corporation organized and existing under the laws of the State of Minnesota and is engaged in interstate commerce in the State of Washington, and that this is a civil suit in which judgment is sought in excess of Three Thousand Dollars (\$3,000.00).

II.

Defendant admits that on January 19, 1952, Northwest Airlines Flight No. 324, Aircraft N-45342, was enroute from Japan to McChord Air Force Base near Tacoma, Washington, via Shemya and Anchorage, Alaska. Defendant denies the remaining allegations of Paragraph II for the reason that it does not have sufficient information to form a belief as to the truth or falsity thereof.

III.

Defendant admits that Flight No. 324 was undertaken by Northwest Airlines, Inc., in accordance with a contract between said defendant and the United States of America for the transportation of government personnel and equipment, and denies the remaining allegations of Paragraph III.

IV.

Defendant denies each and every allegation contained in Paragraph IV of plaintiff's complaint except that it admits that the Sandspit, British

Columbia, airport was designated in defendant's tariffs on file with the Civil Aeronautics Board as an emergency airport.

V.

Defendant denies each and every allegation contained in Paragraph V of the complaint.

VI.

Defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraph VI of the complaint except that it admits that Aircraft No. N-45342 settled in the waters just off the Sandspit, British Columbia, shore January 19, 1952.

VII.

Defendant denies the allegations of Paragraph VII of the complaint except that it admits that Number One Engine on Aircraft No. N-45342 was leased by defendant from Trans World Airlines, Inc., that said engine was received by defendant at Seattle, Washington, October 21, 1951, at which time defendant was advised by TWA of the number of elapsed hours said engine had been in use since its last overhaul.

VIII.

Defendant denies each and every allegation of Paragraph VIII of the complaint.

IX.

Defendant does not have sufficient information

to form a belief as to the truth or falsity of the allegations set forth in the first two lines of Paragraph IX and therefore denies the same. Defendant specifically denies the applicability of the cited statute, and denies that the alleged beneficiary for whose benefit plaintiff is alleged to have instituted this suit has been damaged in the amount of Fifty Thousand Dollars (\$50,000.00) or in any other amount by reason of the facts alleged herein.

As To Second Cause of Action
X.

Defendant repeats, reiterates, and re-alleges each and every of the foregoing allegations, admissions and denials made to the paragraphs of the complaint referred to in paragraphs numbered X and XI thereof, with the same force and effect as though set forth in full herein.

XI.

The allegations of Paragraph XII of the complaint consist of legal arguments and conclusions of law which defendant denies in their entirety. Defendant particularly denies the applicability of the Warsaw Convention to said Flight No. 324.

XII.

Defendant denies each and every allegation contained in Paragraph XIII of the complaint. Defendant alleges that Flight No. 324 on January 18, 1952, from Japan to McChord Air Force Base, Tacoma, Washington, was undertaken and per-

formed in accordance with the terms, conditions, rules and regulations of the afore-mentioned contract with the United States of America, the contract of carriage, defendant's duly filed, posted, published and incorporated tariffs, applicable treaties, and not otherwise.

XIII.

Defendant denies each and every allegation contained in Paragraph XIV of the complaint and specifically denies that it was negligent or that if it was negligent that such negligence constituted willful misconduct within the meaning of the Warsaw Convention.

XIV.

In answer to Paragraph XV of the complaint, defendant denies that the District Court of the United States for the Eastern District of Washington, where this cause of action was instituted, is the court at the place of destination of said Flight 324 referred to in Article 28 (1) of the Warsaw Convention.

XV.

In answer to Paragraph XVI of the complaint, defendant denies the applicability of the Warsaw Convention to the accident which occurred to Aircraft N-45342 on January 19, 1952, and therefore denies that plaintiff has properly invoked Article 17 of said treaty. Defendant further denies that the alleged beneficiary for whose benefit plaintiff is alleged to have brought suit has been damaged in the sum of Fifty Thousand Dollars (\$50,000.00)

or in any other amount by reason of the alleged death of the said John M. Waldrep.

For Further Answer to the Second Cause of Action and by Way of:

First Affirmative Defense

Japan is not a party and has not adhered to the Warsaw Convention. Said treaty is inapplicable to flights where the place of departure is not situated within the territory of a country which is either a party or has adhered to said Convention.

Second Affirmative Defense

Flight No. 324 originated January 18, 1952, from Japan. The flight schedule provided for stops only at Shemya in the Aleutian Islands and Anchorage in Alaska enroute to McChord Air Base, Tacoma, Washington, the point of destination. Both the Aleutian Islands and Alaska are United States territories. There were no agreed stopping places in any territory except territory of the United States, and for that reason said treaty was rendered expressly inapplicable to Flight 324 by Article 1 (2) of the Warsaw Convention.

Third Affirmative Defense

That by reason of the contract hereinbefore mentioned between the United States of America and defendant, Flight 324 was in fact performed by the United States of America and defendant was acting only as an agent of its government. That the United States of America adhered to the

Warsaw Convention in 1934. Said adherence contained the reservation that the Convention should not apply to international transportation performed by the United States.

Fourth Affirmative Defense

Article 28 of the Warsaw Convention provides that actions thereunder shall be brought in the territory of one of the High Contracting Parties before the court of the domicile of the carrier or of its principal place of business, or where plaintiff has a place of business through which the contract has been made, or before the court at the place of destination. The domicile of the carrier is Minnesota. Plaintiff does not have a place of business through which the contract was made. The place of destination of Flight 324 was McChord Field, Tacoma, Washington. The court at the place of destination is either the United States District Court for the Western District of Washington, Southern Division, or the Pierce County Superior Court. An order changing venue of this case from the Eastern District of Washington, Southern Division, to the Western District of Washington, Northern Division, was entered in April, 1954. The order expressly provided that defendant's motion to dismiss the second cause of action on the ground that the United States District Court for the Eastern District of Washington, Southern Division, lacked jurisdiction over the subject matter thereof was preserved and not waived, and that such motion could be presented for determination to the

United States District Court of the Western
Division of Washington, Northern Division.

As To Third Cause of Action

XVI.

Defendant repeats, reiterates, and re-alleges each and every of the foregoing allegations, admissions and denials made to the paragraphs of the complaint referred to in paragraphs numbered XVII and XVIII thereof with the same force and effect as though set forth in full herein.

XVII.

In answer to Paragraphs XIX and XX of the complaint, defendant admits that under the contract between it and the United States of America referred to hereinabove, members of the armed forces were to be transported from Japan to McChord Air Force Base, Tacoma, Washington, and were to be transported in accordance with the provisions of the contract of carriage, defendant's duly filed, posted, published and incorporated tariffs, applicable treaties, and not otherwise. Defendant further admits that its tariffs were duly filed with the Civil Aeronautics Board. To the extent that the allegations of Paragraph XIX and XX are inconsistent with, at variance with, or more inclusive than the admissions herein set forth, they are denied.

John M. Waldrep was not a party to the contract between the United States of America and defendant, and said contract was not made for his

benefit, or for the benefit of persons or cargo to be transported thereunder. The rights of such persons to be transported were not increased or diminished or in any way affected by said contract except that the risks and exposures which would ordinarily devolve upon the defendant as an air-carrier were now assumed by and/or became the responsibility of the United States of America.

XVIII.

Defendant denies the allegations of Paragraph XXI of the complaint.

For Further Answer to the Complaint and by
Way of:

Fifth Affirmative Defense

Even if the transportation referred to in the complaint and the rights of the parties herein are governed by and subject to the provisions of the Warsaw Convention, the defendant duly complied in all respects with the conditions and requirements thereof. Defendant and its agents took all necessary measures to avoid the damages claimed by plaintiff, except for such measures as were impossible for it to exercise, and defendant claims exemption from and limitation of liability in accordance with all of the applicable provisions of said Convention (49 Stat. pt. 2, at p. 3018-3020).

Sixth Affirmative Defense

At all times mentioned in the complaint herein, the aircraft operated by defendant was not in the

exclusive management or control of this defendant, its agents, or employees, but was subject to and under the control of others and if the matters complained of in the complaint herein were due to the fault or neglect of any person or party, then then were due to the fault or neglect of persons or parties for whose acts, fault and neglect the defendant is not responsible.

Seventh Affirmative Defense

That travel on Aircraft No. N-45342 was undertaken subject to, in connection with and with acceptance of the risks and perils of the air through which said aircraft traveled and acts of God over all of which the defendant had no control. That all said risks and dangers were obvious and well known to the passengers who knew or should have known of all said risks and perils, and who, in accepting, undertaking and travelling in said aircraft, assumed, accepted and undertook all of said risks and dangers, the happening of which caused said aircraft to settle in the waters off Sandspit, British Columbia.

Eighth Affirmative Defense

That if the alleged death of John M. Waldrep was caused or contributed to by negligence, fault and want of care, then it was caused by such conduct on the part of persons and parties for whose acts defendant is not liable or responsible, and was not caused or contributed to by the negligence, fault or want of care on the part of this defendant or its agents, officers, servants, or employees.

Ninth Affirmative Defense

That the flight and transportation referred to in the complaint was made by and for and on behalf of the United States of America. That at all times referred to in the complaint, and in connection therewith, the defendant acted only as an agent for the United States of America. There cannot, therefore, be any liability on the part of the defendant for the matters complained of in the complaint herein.

Tenth Affirmative Defense

That plaintiff or the alleged beneficiary for whose benefit this suit is brought has received or is entitled to receive compensation from the United States of America for the alleged death of John M. Waldrep, and as a result thereof plaintiff cannot recover from defendant.

Eleventh Affirmative Defense

That at all times referred to in the complaint herein, the persons of whose acts plaintiff complains were servants and employees of the United States of America, and defendant is not liable for their acts or omissions which may have caused or contributed to the matters complained of in the complaint herein.

Wherefore, defendant prays for judgment dismissing the complaint herein with prejudice and with costs to defendant.

/s/ CARL G. KOCH,

KARR, TUTTLE & CAMPBELL,

Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed December 30, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Comes now the plaintiff and requests that defendant admit or deny within ten (10) days of service hereof the truth of the following allegations pursuant to Rule 36 of the Federal Rules of Pleading, Practice and Procedure.

1. That Northwest Orient Airlines, Inc., flight No. 324 of January 18, 19, 1952, originated in the Empire of Japan and was officially chartered and destined for the United States of America.

2. That the terminals of the said flight were Tokyo, Japan and Tacoma, Washington, U.S.A.

3. That Shemya Island and Anchorage, Alaska, were agreed stopping places.

4. That Sandspit, British Columbia, was designated by Northwest Orient Airlines, Inc., as an emergency airport for aircraft owned by defendant and was designated by officials authorized to do so of the defendant Northwest Orient Airlines, Inc.

5. That the above named decedent, J. M. Wal-drep, was a passenger aboard Flight No. 324, of defendant Northwest Orient Airlines, Inc., on January 19, 1952, which was a Douglas DC-4 Aircraft,

N-45342, when the said aircraft crashed at Sandspit, British Columbia on January 19, 1952.

6. That defendant Northwest Orient Airlines, Inc., received payment for fare for passage of the said decedent J. M. Waldrep on defendant's said Flight No. 324 from Tokyo, Japan to Tacoma, Washington.

7. That the said decedent J. M. Waldrep died in the wreckage of the defendant's said aircraft N-45342 on January 19, 1952, at Sandspit, British Columbia.

8. That the defendant did not issue a ticket, manifest, or contract to said decedent J. M. Waldrep setting forth the particulars required by Section I of Article 3, of Section I, Chapter II of the said Warsaw Convention.

9. That the Empire of Japan prior to January 18, 1952 subscribed to and ratified the Convention for the Unification of Certain Rules Relating to International Transportation by Air With Additional Protocol, which convention is also known as the "Warsaw Convention."

10. That the Empire of Japan has never revoked, or rescinded its subscription to and ratification of the said Warsaw Convention.

Dated at Seattle this 30th day of August, 1956.

/s/ JOHN W. RILEY,
Attorney for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed August 31, 1956.

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S REQUEST FOR
ADMISSIONS OF FACT

Comes Now defendant and in response to plaintiff's request that defendant admit or deny specified allegations made pursuant to Rule 36 of the Federal Rules of Pleading, Practice and Procedure, defendant Northwest Orient Airlines, Inc., in numbered paragraphs corresponding to the numbering of plaintiff's request for admissions of fact, hereby admits, denies and alleges:

1. Defendant admits that Northwest Orient Airlines, Inc., Flight No. 324 of January 18, 19, 1952, originated in the Empire of Japan and was destined for the United States of America. Conceding that said Flight No. 324 was part of an operation conducted by defendant for the United States Government under contract with the United States Government, defendant does not know and is unable to obtain facts upon which it can determine whether or not said flight was "officially chartered", and does not understand what plaintiff means by the term "officially chartered", and therefore denies the same.

2. Defendant denies the allegations of paragraph 2.

3. Defendant denies the allegations of paragraph 3.

4. Defendant denies the allegations of paragraph 4, but concedes that Sandspit, British Col-

umbia, was listed in defendant's manual as an airport where an emergency landing could be made.

5. Defendant is unable to truthfully admit or deny the allegations of paragraph 5 because it has no knowledge as to the facts contained in such request and is unable to secure such knowledge.

6. Defendant denies the allegations of paragraph 6.

7. Defendant is unable to truthfully admit or deny the allegations of paragraph 7 because it has no knowledge as to the facts contained in such request and is unable to secure such knowledge.

8. Defendant denies the allegations of paragraph 8.

9. Defendant denies the allegations of paragraph 9.

10. Defendant admits the allegations of paragraph 10.

Dated at St. Paul, Minnesota, this 17 day of September, 1956.

NORTHWEST ORIENT AIR-
LINES, INC.,

/s/ By A. E. FLOAN,
Vice President and Secretary.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 24, 1956.

[Title of District Court and Cause.]

ORDER OF CONTINUANCE AND
CONSOLIDATION

This matter came on regularly for hearing on the 25th day of September, 1956, before the Honorable John C. Bowen, Judge of the above entitled court on motion of the plaintiff for continuance and order of consolidation, both parties having appeared by their respective counsel of record, the court having considered the records and files herein and in Civil Cause No. 3872 being entitled H. B. Maynard, plaintiff, vs. Northwest Orient Airlines, Inc., defendant; it appearing that both actions are concerned with damages incurred in a single crash of the defendant's aircraft and that the parties having agreed that an order of consolidation should be entered and good cause appearing therefor,

It Is Hereby Ordered that the above entitled action and Civil Cause No. 3872, entitled H. B. Maynard, plaintiff, vs. Northwest Orient Airlines, Inc., defendant, shall be and hereby are consolidated for trial commencing March 12, 1957, beginning at 10:00 o'clock a.m. of that day, or as soon thereafter as counsel may be heard, said actions to be tried together insofar as the matters affecting each party may be so considered, and it is further

Ordered that the above entitled action shall be and hereby is continued for trial from October

16, 1956 until March 12, 1957, beginning at 10:00 o'clock a.m. of that day.

Done in Open Court this 4th day of October, 1956.

/s/ JOHN C. BOWEN,
Judge

Presented and Approved by:

/s/ JOHN W. RILEY, Attorney for Plaintiff.

Approved by:

/s/ CARL G. KOCH, of Karr, Tuttle & Campbell,
Attorneys for Defendant.

[Endorsed]: Filed October 4, 1956.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO AMEND PARAGRAPH IX OF DEFENDANT'S ANSWER

Defendant hereby moves the Court for leave to amend paragraph IX of defendant's answer so that the proper wrongful death statute applicable to the facts of this case may be pleaded. This motion is made and based upon the records and files herein and upon the following affidavit.

/s/ COLEMAN P. HALL,
KARR, TUTTLE & CAMPBELL,
Attorneys for Defendant.

AFFIDAVIT

State of Washington,
County of King—ss.

Coleman P. Hall, being first duly sworn, on oath deposes and states:

That he is one of the attorneys for the above named defendant and makes this affidavit for and on behalf of defendant in support of its motion for leave to amend paragraph IX of its answer to plaintiff's complaint. That defendant desires by said amendment to plead the wrongful death statute of the Province of British Columbia, Canada, which statute defendant feels is applicable to the facts alleged in plaintiff's complaint. That to allow such amendment would impose no hardship on or inconvenience to the plaintiff since the applicability of said statute has been raised numerous times by previous motions made in said cause. That it is necessary that leave to amend be granted in order that the ends of justice be served.

/s/ COLEMAN P. HALL

Subscribed and Sworn to before me this 20th day of February, 1957.

/s/ RUBY TUTMARK,

Notary Public in and for the State of Washington, residing at Seattle.

Acknowledgment of Service attached.

[Endorsed]: Filed February 20, 1957.

[Title of District Court and Cause.]

AFFIDAVIT CONTRA MOTION FOR LEAVE
TO AMEND ANSWER

United States of America,
State of Washington,
County of King—ss.

John W. Riley, being first duly sworn on oath
deposes and says:

That he is one of the attorneys for the above
named plaintiff, makes this Affidavit for and on be-
half of plaintiff in opposition to the Motion of the
defendant now filed herein for leave to amend para-
graph 9 of the defendant's Answer to plaintiff's
Complaint.

Affiant declares that the needs of justice will be
sub-served by the amendment and that the plain-
tiff's cause will be substantially prejudiced by
granting the defendant leave to amend.

The plaintiffs in the above entitled action and
the companion case of Maynard v. Northwest Air-
lines are without substantial funds which would
ordinarily be necessary to prosecute these actions in
that for this reason the parties have consolidated
these matters for trial. Plaintiff has relied in prep-
aration of its case upon the pleadings as they exist
based upon the proposition that the laws of forum
will govern the matters now at issue herein. In the
event that defendant is granted leave to amend,
many substantial and difficult legal issues for which

the plaintiff is not prepared will be presented. Plaintiff does not have funds to retain Canadian counsel to brief the British Columbia law which the defendant intends to assert and if the amendment is granted, plaintiffs will move for continuance of this action in order to afford plaintiffs a reasonable time to prepare the said matter.

The plaintiff's position was disclosed to the defendants over a year ago, as the records and file herein disclose, by memorandum of the plaintiff contra defendant's Motion to Dismiss which called the court's attention to the fact that defendant had not pleaded the British death act and that therefore the law of forum governs according to the well known rules of law of this jurisdiction.

/s/ JOHN W. RILEY

Subscribed and Sworn to before me this 25th day of February, 1957.

[Seal] ROBERT W. WINSOR,
Notary Public in and for the State of Washington,
residing at Bellevue.

[Endorsed]: Filed February 25, 1957

[Title of District Court and Cause.]

AMENDMENT TO PARAGRAPH IX OF DEFENDANT'S ANSWER

IX and XII Affirmative Defense

Defendant does not have sufficient information to form a belief as to the truth or falsity of the

allegations set forth in the first two lines of Paragraph IX and therefore denies the same. Defendant specifically denies that the alleged beneficiary for whose benefit plaintiff is alleged to have instituted this suit has been damaged in the amount of Fifty Thousand Dollars (\$50,000.00) or in any other amount by reason of the facts alleged herein. Defendant specifically denies the applicability of Section 4.20.010 of the Revised Code of Washington and alleges that the applicable statute on which plaintiff's claim could have been based is Chapter 116, British Columbia Revised Statutes, 1948, entitled, "Families' Compensation Act," Sections 3 and 5, which provide as follows; and which requires dismissal of Plaintiff's Complaint for failure to state a cause of action. That said statute's limitation provisions bar this action.

"Section 3. Whenever the death of a person shall be caused by wrongful act, neglect, or default and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, and notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offense."

"Section 5. Not more than one action shall lie for and in respect of the same subject-matter of

complaint; and every such action shall be commenced within twelve calendar months after the death of such deceased person."

KARR, TUTTLE & CAMPBELL,
/s/ COLEMAN P. HALL,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 25, 1957.

United States District Court, Western District of
Washington, Northern Division

Civil Action No. 3872

H. D. MAYNARD, Plaintiff,
vs.

NORTHWEST AIRLINES, INC., Defendant.

Civil Action No. 3695

GERALDINE B. GORTER, as Administratrix of
the Estate of John M. Waldrep, Deceased,
Plaintiff,
vs.

NORTHWEST AIRLINES, INC., Defendant.

STIPULATION

It is hereby stipulated by and between the parties to the above-entitled action by and through their respective counsel of record as follows:

That the documents which have been identified by counsel as described hereinafter are true copies of original documents in the possession of the defendant, Northwest Airlines, and that the said copies may, if otherwise admissible, be submitted in evidence in lieu of the originals thereof.

The documents being Exhibit A-1, operating schedule for North Pacific contract flights from Seattle, Washington to Tokyo and from Tokyo to Seattle, in effect November 15, 1951 prepared by defendant under the procedure set forth in the contract between the U. S. Air Force and defendant, referred to in paragraph (8) of the Pre-Trial Order on file herein. Exhibit A-13, report of attendance at defendant's air and sea rescue class by Jane Cheadle, stewardess of flight 324. Exhibit A-16 is the manual assignments of crew members Pfaffinger, Kuhn, and Cheadle. Exhibit A-17 is letter dated January 24, 1952 from E. Hohag, Captain of Flight 324 of January 17, 1952 from Shemya to Anchorage; Exhibit A-18 is maintenance information relative to flight 324 of January 17, 1952, Ship 601/342 contained in letter dated January 21, 1952, from Donald M. Jaffray, defendant's Station Manager, Shemya, to W. D. Gehringer, Superintendent of Costs and Requirements Section of defendant, St. Paul, Minnesota; Exhibit A-19 is report from Tokyo Crew Chief's Log contained in letter dated January 21, 1952, from W. J. Greer, defendant's Chief Mechanic, Tokyo, to Wade Gehringer, Superintendent of Costs and Requirements Section of defendant, St.

Paul, Minnesota; Exhibit A-20 is maintenance reports on Ship 342 (601) contained in letter dated January 19, 1952, from M. B. Lien, defendant's Chief Mechanic, and C. E. Skellett, defendant's Relief Crew Chief, Elmendorf Air Base, to defendant's Wade Gehringer and C. F. Wilde, Superintendent of Line Maintenance, St. Paul, Minnesota; and Exhibit A-21 is defendant's No. 2 maintenance check NWA DC-4 plane No. 601, January 13-15, 1952, containing ground check DC-4, Seattle inspection progress chart, 14 nonroutine work cards, 11 line service check cards, 4 routing order cards, 3 engine propellor change cards, 14 inspection cards, ship preparation card, 10 engine change cards, and 5 equipment service grooming cards.

Dated this 18 day of March, 1957.

WILLIAMS & KINNEAR,
/s/ J. W. RILEY,
Of Counsel Attorneys for Plaintiffs.

KARR, TUTTLE & CAMPBELL,
/s/ CARL G. KOCH,

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Causes.]

PRE-TRIAL ORDER

This matter came on regularly for hearing on the 20th day of February, 1957 before the undersigned judge of the above-entitled Court on notice

to counsel of pre-trial hearing pursuant to Rule 16 of the Federal Rules of Civil Procedure. At the conclusion of hearing on February 20, the Court adjourned the hearings until March 9, 1957 at 10:00 a.m.

Plaintiffs appeared by their attorneys, Williams and Kinnear, John W. Riley, Morell E. Sharp and Ronald A. Murphy, of counsel. Defendant appeared by its attorneys, Karr, Tuttle and Campbell, Mr. Payne Karr and Carl Koch of counsel.

Pursuant to the Federal Rules of Civil Procedure, counsel of the parties having indicated agreement at said hearing as to the matters hereinafter set forth,

It Is Hereby Ordered:

(1) That plaintiffs' Exhibit 1 endorsed by the undersigned judge of the above-entitled Court in the presence of counsel for both parties, identified by counsel of both parties, and delivered, on Motion of the counsel for the defendant to Mr. Morell Sharp of counsel for the plaintiffs, is a true and correct copy of the accident investigation of the Civil Aeronautics Board, file No. 1-0017, released September 15, 1952 by the Civil Aeronautics Board.

If otherwise admissible the said report and attachments or any portion thereof may be received in evidence without additional proof as to the validity, and identity, of the said document as a true and correct copy of said accident investigation report of the Civil Aeronautics Board, pur-

suant to the provisions of the Civil Aeronautics Act.

(2) That plaintiffs' Exhibit 2 is duly endorsed by the undersigned judge of the above-entitled Court, identified by counsel for both parties and on Motion of counsel for the defendant, were delivered to Mr. Morell Sharp, of counsel for plaintiffs, until the time of trial, is a supplemental accident investigation report released by the Civil Aeronautics Board on November 14, 1955 following further investigation of the crash of Northwest Airlines flight 324 at Sandspit, B. C., on January 19, 1952. If otherwise admissible, said report and attachments or any portion thereof may be received in evidence without additional proof as to the validity or identity of the said document.

(3) That Exhibit 3 attached hereto is the true and correct copy in French and in English of the convention and additional protocol between the United States of America and other powers on international air transportation, commonly referred to as the "Warsaw Convention" and that the said Exhibit 3 is for the purposes of the trial of the matters herein a sufficient reproduction of the records of the United States, Department of State, and the Government of Poland which is the depository nation for the Warsaw Convention, and if otherwise admissible shall be received in evidence without additional proof.

(4) That Exhibit 4 attached hereto is a true and correct copy of the adherence of the United States

of America to the said convention and additional protocol between the United States of America and other powers set forth in Exhibit 3 referred to in paragraph (3) above, and if otherwise admissible shall be received in evidence without additional proof.

(5) That Exhibit 5 attached hereto at the time of signing this Order is a true and correct copy of the Families' Compensation Act, Chapter 116, British Columbia Revised Statutes, 1948, and that said Exhibit 5 is for the purposes of the trial of the matters herein an authentic and true copy of such law of British Columbia, and if otherwise admissible shall be received in evidence without additional proof.

(6) That Exhibit 6 attached hereto is an aeronautical planning chart prepared by the United States Air Force, distributed by the United States Coast and Geodetic Survey.

(7) That Geraldine B. Gorter is the duly qualified and acting administratrix of the Estate of Sergeant J. M. Waldrep and that Exhibit 7 is a certified copy of her Letters of Administration issued by the Superior Court of the State of Washington in and for Walla Walla County. That special Letters of Administration, attached hereto as Exhibit 8 were issued prior to the commencement of this action, the same having been issued on the 18th day of January, 1952.

(8) That Exhibit 9 attached hereto is a copy of

the basic contract executed by the U. S. Air Force with the defendant, Northwest Airlines, which prescribes the terms and conditions of payment by the U. S. Air Force for transportation to be performed by the defendant and under which flight 324 of January 19, 1952 was being performed. That "service orders" and schedules for flight 324 which are part of the said contract are not included herein but may be produced and identified at the time of trial.

(9) That Exhibit 10 now in the possession of the Clerk of this Court attached hereto is a true, correct and certified copy of the United States Army Service Record of John M. Waldrep, deceased, the original of which is in the possession of the Department of the Army. That said copy is a photostatic copy, white on black.

(10) That Exhibit 11 attached hereto is a true and correct and certified copy of the United States Air Force Service Record of Huford D. Maynard, the original of which is in the possession of the Department of the Army. That said copy is a photostatic copy, white on black.

(11) If the Court rules that said Exhibits 10 and 11 are otherwise admissible but the Court will not receive them in evidence because the photostats are not black on white, the parties seeking to have either of such Exhibits admitted into evidence shall be authorized, and the Clerk of the Court ordered to deliver such Exhibits to such party for the purposes of enabling such party to

obtain photostats having black print on a white background and such Exhibits shall have the same authority as those from which prepared.

(12) That the Empire of Japan ratified and filed its adherence to the Warsaw Convention on or about May 20, 1953.

(13) That Exhibit A-2 is the Air Passenger Manifest listing the passengers embarking on Flight No. 324 on January 17, 1952, at Haneda Air Base, Japan; Exhibit A-3 is the Flight Plan of Flight 324 of January 18 and 19, 1952, covering the Anchorage to McChord Field leg of the flight, and includes a forecast cross-section from Anchorage to Seattle flight plan from Elmendorf Air Base to McChord Field, extracts from weather sequence, weather forecast and aircraft service check; Exhibit A-4 is the Weight and Balance Manifest for defendant's Flight 324 of January 18 and 19, 1952, from Elmendorf Air Base to Tacoma, Washington; that Exhibit A-5 is the Flight Position Log, Flight 324 of January 18 and 19, 1952, certified to be a true copy by R. E. Middlestaedt, Chief Clerk of the Flight Operations Division of the defendant; Exhibit A-6 is the Flight Control Log of Flight 324 of January 18 and 19, 1952, prepared by E. B. Smith, defendant's Area Chief Flight Superintendent, Elmendorf Air Base; Exhibit A-7 is outline of pilot history of John J. Pfaffinger, pilot of Flight 324 of January 18 and 19, 1952; Exhibit A-8 is portions of training record of John J. Pfaffinger dated February 4, 1952; Ex-

hibit A-9 is outline of pilot history of Kenneth H. Kuhn, co-pilot of Flight 324 of January 18 and 19, 1952; Exhibit A-10 is a portion of training record of Kenneth H. Kuhn dated February 4, 1952; Exhibit A-11 is summary of records of trips flown together by pilot Pfaffinger and co-pilot Kuhn, dated February 5, 1952; Exhibit A-12 is Before Flight Check Out Inspection DC-4 Elmendorf Air Base, January 18, 1952, Ship No. 342, and air service check; Exhibit A-14 is Before Flight Check Out Inspection, Seattle, January 15, 1952, Ship No. 601, Trip No. 324/15; Exhibit A-15 is Northwest Airlines, Inc. interoffice communication from Bert Wean, Service Chief, Shift I, Seattle, to E. K. Pitcher, Supervisor of Equipment Service Maintenance Division, Seattle, dated January 24, 1952, listing equipment put on Ship 601 and sketch showing locations.

That each of the foregoing exhibits attached hereto is an authentic and true copy of the original thereof and a part of the business records and files of defendant, and if otherwise admissible, each may be received in evidence without additional proof as to validity and identity.

(14) It is further ordered, the parties hereto having stipulated, that the foregoing Exhibits attached hereto are authentic and true copies of the original thereof and if otherwise admissible may be received in evidence without additional proof of authenticity. The question of the admissibility in evidence of any of the above and foregoing evidence is reserved until the time of trial.

Done in open court this 18th day of March, 1957.

/s/ JOHN C. BOWEN,
Judge

Approved for Entry:

/s/ JOHN W. RILEY, Attorneys for Plaintiffs.

Approved for Entry:

/s/ CARL G. KOCH, Attorneys for Defendant.

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Cause.]

TRIAL AMENDMENT OF COMPLAINT

Plaintiff's complaint is hereby amended by adding to Paragraph IX of Count I on page 4 of the complaint an additional paragraph stating the following:

"That the death of the decedent was directly and proximately caused by the following specific negligent acts, errors, wilful omissions and misconduct of the defendant and its agents:

(1) That engine No. 1 and aircraft were negligently inspected and maintained by defendant.

(2) That the safety literature kept in the aircraft for distribution to passengers was inadequate and related to a different configuration of aircraft and different safety equipment, and further that literature was not distributed to the passengers.

(3) That the aircraft was not adequately equipped with safety and survival equipment.

(4) That defendant violated Civil Aeronautics Regulations and company regulations in that it did not consult with and advise the pilot in preparation for landing following loss of the Number 1 engine.

(5) In attempting to land the aircraft too far down the runway and then attempting to take off again after it had become too late to gain proper flying speed.

(6) The lift rafts in the aircraft were stowed aboard the aircraft in such a manner that they were inaccessible when needed.

(7) Defendant failed to effectuate any precautionary and safety procedure despite the fact that the plane was operating on only three engines and was attempting to make a night landing on an ill equipped, poorly illuminated field located on a small snow covered island.

Dated this 26th day of March, 1957.

JOHN W. RILEY and
WILLIAMS & KINNEAR,

/s/ By JOHN W. RILEY

[Endorsed]: Filed March 26, 1957.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO AMEND DEFENDANT'S ANSWER; MOTION TO RE-OPEN FOR FURTHER EVIDENCE

Defendant hereby respectfully moves the Court for leave to amend defendant's Answer and affirmative defense to count one of plaintiff's Complaint, a copy of which proposed amendment is attached hereto. The purpose of said amendment is to plead the law in effect January 19, 1952, at the place where the Court, after trial, found the accident occurred, which law constitutes a complete defense to count one of plaintiff's Complaint.

Defendant further moves the Court to re-open this cause for the presentation of evidence and testimony relating to said law for the purpose of enabling the Court to determine the law applicable to the facts of this case.

These motions are made and based upon the records and files herein and the affidavit attached hereto.

KARR, TUTTLE & CAMPBELL,
/s/ CARL G. KOCH,
Attorneys for Defendant.

AFFIDAVIT

State of Washington,
County of King—ss.

Carl G. Koch, being first duly sworn, on oath deposes and states:

That he is one of the attorneys for the above-

named defendant and makes this affidavit for and on behalf of defendant in support of its above-stated motions. That according to the Washington conflict of laws rule, the law of the place of injury governs a cause of action, if any, for tort. Plaintiff in her complaint alleged that the crash of the airplane in which Waldrep died occurred in British Columbia, Canada. Defendant by its answer admitted this allegation and pleaded as an affirmative defense the British Columbia Families' Compensation Act, the law of admitted place of injury, for the purpose of showing that plaintiff's action was barred. At no time prior to or during the trial did either plaintiff or defendant maintain or seek to prove that the accident did not happen in British Columbia. Based upon the admitted fact, defendant introduced testimony in support of its affirmative defense for the purpose of establishing the applicability of the said British Columbia act.

However, the Court in its Oral Decision found that the accident did not occur in British Columbia, and defendant is now for the first time confronted with this assertion. Prior to this time defendant had no occasion to plead or prove the law existing outside of British Columbia, and any attempt to do so would have been improper and objectionable. It was only after the Court's finding that the law outside of British Columbia became pertinent and applicable.

Defendant has suffered complete surprise by the Court's finding, and defendant by its motions now

seeks an opportunity to place before the Court the law applicable to the now established facts of this case. Such law does not permit a recovery by plaintiff and constitutes a complete defense to her action. If defendant is not afforded an opportunity to plead and prove the law in effect at the place where the Court has found the accident occurred, defendant would be permanently prejudiced. The interests of justice would best be served and indeed require that defendant be given such opportunity.

/s/ CARL G. KOCH

Subscribed and Sworn to before me this 13th day of May, 1957.

[Seal] /s/ MURIEL MAWER,
Notary Public in and for the State of Washington,
residing at Seattle.

Acknowledgment of Service attached.

[Endorsed]: Filed May 14, 1957.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER AND AFFIRMATIVE DEFENSE

I.

That if on January 19, 1952, at a point without British Columbia, Canada, more than one-half mile seaward from low water mark, near Sandspit, British Columbia, the airplane operated by defendant crashed and the death of decedent Wal-

drop occurred, there was no applicable law under which an action to recover for the wrongful death of the said Waldrep could be brought or maintained.

II.

That the Families' Compensation Act of British Columbia heretofore pleaded, Sections 3 and 5 of which are set forth verbatim in defendant's Answer, is a wrongful death statute enacted by the Legislature of British Columbia and applies in the Territory of British Columbia seaward to low water mark. *Young vs. Industrial Chemical Co., Ltd. and Brunt*, (1939) 2 WWR 468, decided in 1939 by the Supreme Court of British Columbia, held that the Families' Compensation Act does not have extraterritorial effect. This case is considered to establish the controlling British Columbia law, although *LeVal vs. S. S. Giovanni Amendola*, 17 WWR 144, decided in 1955 by the Admiralty side of the Exchequer Court, a federal court of the Dominion of Canada sitting in British Columbia, held that in a case in which the Admiralty Court had jurisdiction it might properly apply the wrongful death statute of British Columbia, namely the Families' Compensation Act.

There is no other legislation of the Territory of British Columbia creating a cause of action for wrongful death. A cause of action for wrongful death did not exist at common law. British Columbia and the Dominion of Canada are common law jurisdictions.

III.

The only other law making authority with power to legislate in the Territory of British Columbia and in the coastal waters of Canada surrounding British Columbia is the Parliament of the Dominion of Canada. Apart from the Carriage By Air Act of 1939 which implements the provisions of the Warsaw Convention, which was ratified prior to the date of passage by said act by Canada, the only statute of the Dominion of Canada creating a cause of action for wrongful death is the Canada Shipping Act of 1934 as amended in 1948 and contained in Chapter 35 of the Statutes of Canada for 1948. Section 725 to Section 733, inclusive, of the Canada Shipping Act, which appear as Section 53, of Chapter 35 of the Statutes of Canada for 1948, are as follows:

“Part XVII.

“Fatal Accidents.

“725. In this Part,

“(a) ‘child’ includes a son, daughter, grandson, granddaughter, stepson, stepdaughter, adopted child and a person to whom the deceased stood in loco parentis;

“(b) ‘dependants’ means the wife, husband, parents and children of the deceased; and

“(c) ‘parent’ includes a father, mother, a grandfather, grandmother, stepfather, stepmother, a person who adopted a child, and a person who stood in loco parentis to the deceased. 1948, c. 35, s. 53.

“726. Where the death of a person has been

caused by such wrongful act, neglect or default as if death had not ensued would have entitled the person injured to maintain an action in the Admiralty Court and recover damages in respect thereof, the dependants of the deceased may, notwithstanding his death, and although the death was caused under circumstances amounting in law to culpable homicide, maintain an action for damages in the Admiralty Court against the same defendants against whom the deceased would have been entitled to maintain an action in the Admiralty Court in respect of such wrongful act, neglect or default if death had not ensued. 1948, c. 35, s. 53.

“727. (1) Every action under this Part shall be for the benefit of the dependants of the deceased, and except as provided in this Part shall be brought by and in the name of the executor or administrator of the deceased, and in every such action such damages may be awarded as are proportioned to the injury resulting from the death to the defendants respectively for whom and for whose benefit such action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the dependants in such shares as may be determined at the trial.

“(2) In assessing the damages in any action there shall not be taken into account any sum paid or payable on the death of the deceased or any future premiums payable under any contract of assurance or insurance. 1948, c. 35, s. 53.

“728. The defendant may pay into court one

sum of money as compensation for the wrongful act, neglect or default, to all persons entitled to such compensation without specifying the shares into which it is to be divided. 1948, c. 35, s. 53.

“729. Not more than one action lies for and in respect of the same subject matter of complaint, and every such action shall be commenced within twelve months after the death of the deceased and not afterwards. 1948, c. 35, s. 53.

“730. (1) The plaintiff shall, in his statement of claim, set forth the persons for whom and on whose behalf the action is brought.

“(2) There shall be filed with the statement of claim an affidavit by the plaintiff in which he shall state that to the best of his knowledge, information and belief the persons on whose behalf the action is brought as set forth in the statement of claim are the only persons entitled or who claim to be entitled to the benefit thereof.

“(3) The Admiralty Court or a judge thereof, if of opinion that there is a sufficient reason for doing so, may dispense with the filing of the affidavit. 1948, c. 35, s. 53.

“731. (1) When there is no executor or administrator of the deceased, or there being such executor or administrator, no such action is, within six months after the death of the deceased, brought by such executor or administrator, such action may be brought by all or any of the persons for whose benefit the action would have been if it had been brought by such executor or administrator.

“(2) Every action so brought shall be for the benefit of the same persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by such executor or administrator. 1948, c. 35, s. 53.

“732. (1) Where the compensation has not been otherwise apportioned, a judge in chambers may apportion the same among the persons entitled.

“(2) The judge may in his discretion postpone the distribution of money to which infants are entitled and may direct payment from the undivided fund. 1948, c. 35, s. 53.

“733. Where actions are brought by or for the benefit of two or more persons claiming to be entitled, as wife, husband, parent or child of the deceased, the court may make such order as it may deem just for the determination not only of the question of the liability of the defendant but of all questions as to the persons entitled under the provisions of this Act to the damages, if any, that may be recovered. 1948, c. 35, s. 53.”

Section 729 set forth above requires a wrongful death action to be commenced within twelve months after the death of a deceased and not afterwards. This section creates a statute of limitations which is part and parcel of the right of action created and is a bar to plaintiff's cause of action under the express provisions of R.C.W. 4.16.290. The aforesaid Canada Shipping Act as amended in 1948 was in full force and effect January 19, 1952, the date of the death of said Waldrep.

IV.

Section 726 of the Canada Shipping Act provides that the wrongful death action provided for in Part XVII, entitled Fatal Accidents, of the Canada Shipping Act shall be maintained in the Admiralty Court provided the deceased would have been entitled, had death not ensued, to maintain an action in the Admiralty Court to recover damages. The decisions construing this section of the Canada Shipping Act have not departed from the requirement that the cause of action for wrongful death must be maintained in the Admiralty Court. The Admiralty Court is the Exchequer Court of Canada sitting on its Admiralty side. The Exchequer Court is a statutory court which does not have general common law jurisdiction. In exercising the admiralty jurisdiction, the Exchequer Court is limited to those subjects set out in the Admiralty Act. In tort actions for damage the jurisdiction of the Admiralty Court is confined to claims for damage received by a ship or damage done by a ship. This limitation on jurisdiction excludes injuries sustained by passengers when an aircraft crashes into the water. The jurisdiction of the Admiralty Court as far as aircraft are concerned is strictly limited to a collision between an airplane and a ship. Such jurisdiction does not extend or apply to the death of an airplane passenger when an airplane crashes into the water, and particularly to the decedent Waldrep. The Admiralty Act of 1934, Chapter 31, Statutes of Canada, 1934, provides in part as follows:

“Jurisdiction

“18. (1) The jurisdiction of the Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters are within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.

“(2) Without restricting the generality of subsection (1) of this section, and subject to the provisions of subsection (3) thereof, section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, of the Parliament of the United Kingdom, which is Schedule A to this Act, shall in so far as it can, apply to and be applied by the Court, *mutatis mutandis*, as if that section of that Act had been by this Act re-enacted, with the word ‘Canada’ substituted for the word ‘England’, the words ‘Governor in Council’ substituted for ‘His Majesty in Council’, the words ‘Canada Shipping Act’ (with the proper references to years of enactment and sections) substituted, except with relation to mortgages, for the words ‘Merchant Shipping Act’ (and any equivalent references to years of enactment and sections) and with the words ‘or

other judicial district' added to the words 'body of a county', wherever in such section 22 of such Supreme Court of Judicature (Consolidation) Act, 1925, any of the indicated words of that Act appear.

“(3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine

“(a) any claim

(i) arising out of an agreement relating to the use or hire of a ship,

(ii) relating to the carriage of goods in a ship, or

(iii) in tort in respect of goods carried in a ship,

“(b) any claim for necessities supplied to a ship,
or

“(c) any claim for general average contribution.

“(4) No action in rem in respect of any claim mentioned in paragraph (a) of subsection (3) is within the jurisdiction of the Court unless it is shown to the Court that at the time of the institution of the proceedings no owner or part owner of the ship was domiciled in Canada.

“(5) The jurisdiction of the Court over claims for services in the nature of salvage includes jurisdiction in rem and in personam in relation to salvage of life or property of, from or by aircraft on or over the sea or any tidal waters and on or over the Great Lakes of North America, so called, and such jurisdiction shall be exercised and applied in the same manner, to the same extent and with

the same effect as if such aircraft were ships; but the Governor in Council may *be* Order in Council make modifications of and exemptions from the provisions of this subsection to such extent as appears to him necessary or expedient.

“(6) The Court on its Admiralty side has and shall exercise such other jurisdiction and execute such power and authority, in or relating to admiralty matters, as

“(a) heretofore have been conferred upon it by any Act of the Parliament of Canada, or

“(b) hereafter may be conferred upon it, at the request and with the consent of Canada, by any Act of the Parliament of the United Kingdom or of any British Dominion, enacted in execution of any agreement for reciprocal legislation with relation to Admiralty jurisdiction or to shipping and navigation made or to be made and including Canada as a party thereto.

“(7) The jurisdiction of the Court on its Admiralty side shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by general rules and orders, and where no special provision is contained in this Act or in general rules and orders with reference thereto any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it may now be exercised by the Court. 1934, c. 31, s. 18.

The Supreme Court of Judicature (Consolidation) Act, 1925, of the Parliament of the United Kingdom, incorporated by reference in Section 18

(2) of the Admiralty Act above set forth, appears as Schedule A, pages 13 to 15, of the Revised Statutes of Canada for 1952, the pertinent and material portions of which are as follows:

“(1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as ‘admiralty jurisdiction’) that is to say:

“(a) Jurisdiction to hear and determine any of the following questions or claims:

“(i) Any question as to the title to or ownership of a ship, or the proceeds of sale of a ship remaining in the admiralty registry, arising in an action of possession, salvage, damage, necessities, wages or bottomry;

“(ii) Any question arising between co-owners of a ship registered at any port in England as to the ownership, possession, employment or earnings of that ship, or any share thereof, with power to settle any account outstanding and unsettled between the parties in relation thereto, and to direct the ship, or any share thereof, to be sold, or to make such order as the Court thinks fit;

“(iii) Any claim for damage received by a ship, whether received within the body of a county or on the high seas;

“(iv) Any claim for damage done by a ship.”

The Admiralty Act of 1934 and the Supreme Court of Judicature (Consolidation) Act of the United Kingdom of 1925 in their entirety and the portions set forth verbatim above were in full force and effect January 19, 1952.

That the Dominion of Canada having exclusive power to legislate over shipping and in the navigable waters surrounding British Columbia, has not changed the common law or created any wrongful death statute or other act entitling the administrators of Waldrep's estate or persons acting for the benefit of his surviving dependants to maintain an action to recover damages by reason of his death as aforesaid.

V.

The law of British Columbia and of the Dominion of Canada is based on the common law. At common law as it existed in British Columbia and in Canada January 19, 1952, there was no cause of action for the death of a person caused by the default or neglect of another person. No statute creating an action for wrongful death in derogation of the common law under which plaintiff can maintain an action was in effect January 19, 1952, at the place where the airplane operated by defendant crashed and the decedent Waldrep died.

VI.

That if the place where the airplane operated by defendant crashed and the decedent Waldrep died was at a point seaward from and beyond the territorial waters of Canada and without the jurisdiction of the courts of British Columbia in the Dominion of Canada, then the accident and death occurred at a point which on January 19, 1952, was not within the territory of any government or sovereignty; at a point where there was no system

of laws in force; where there was no law or statute under which plaintiff's action can be maintained.

Dated this 13th day of May, 1957.

KARR, TUTTLE & CAMPBELL,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Lodged May 14, 1957.

[Title of District Court and Causes.]

COURT'S DECISION

The Court: From a preponderance of the evidence in these two cases consolidated for trial, the Court, so far as pertains to each, finds, concludes and decides as follows:

That the place where the decedent Waldrep died and where his death was caused and where plaintiff Maynard was injured was at a point in salt water more than a half mile out seaward from low water mark near Sandspit, British Columbia, Dominion of Canada.

That the British Columbia Families' Compensation Act, which provides an action for wrongful death similar to that provided for wrongful death under the laws of the United States of America and the various states thereof under so-called wrongful death acts, does not apply nor govern the rights of the plaintiff Gorter in this case which are asserted against the defendant in plaintiff Gorter's action growing out of the alleged wrongful death of the

decedent Waldrep. Such death was not caused, according to British Columbia law, at a place within British Columbia jurisdiction because the place of death was not above the low water mark made by tidal low water on the shores of the British Columbia land near which the death of said decedent Waldrep occurred, so far as concerns the twelve-month limitation of time within which the action might be commenced in respect to said wrongful death of said Waldrep. Therefore, such time limit law of British Columbia does not apply and the defendant should take nothing by reason of the defendant's affirmative defense concerning that issue, it being the finding, conclusion and decision of the Court that the allegations of that affirmative defense and each and all of defendant's other affirmative defenses as to Count I of plaintiff Gorter's complaint are not sustained by a preponderance of the evidence in this case.

It is further from such preponderance of the evidence the finding, conclusion and decision of the Court that the action in the Gorter case for wrongful death on account of the matters and things therein alleged has been commenced within the time provided by law of the State of Washington which governs the right of action herein sued upon in Count I of the Gorter case, no other applicable law being pleaded or proved.

It is further the finding, conclusion and decision of the Court that, as alleged by plaintiff, the death of said decedent Waldrep and the injuries sustained by plaintiff Maynard were caused wrongfully and

negligently by reason of the matters and things and acts of negligence, omissions and misconduct on the part of the defendant as follows:

1. That the No. 1 engine on the aircraft on which the decedent Waldrep and plaintiff Maynard were passengers was negligently inspected and maintained by the defendant.

2. That the safety literature kept in the aircraft for distribution to passengers was inadequate and related to a configuration of aircraft different from the aircraft in use on the flight here in question, and that safety equipment different from that mentioned in the literature was in use upon this aircraft; and, further, such literature as was available for distribution to the passengers was not in fact distributed among them, nor as directed in the literature itself and in the defendant's corporate and business requirements; and defendant negligently failed to distribute the literature to and among the passengers, including the decedent Waldrep and plaintiff Maynard.

3. That the defendant violated the Civil Aeronautics Regulations and also the defendant's company regulations in that the defendant negligently did not consult with and advise the pilot in his preparation for landing following the loss and going out of commission of the No. 1 engine here in question.

4. That defendant's pilot was negligent in first landing the aircraft too far down the runway at Sandspit, British Columbia, and then thereafter attempting to take the airplane off again into the air

at a point on the airstrip when the plane had gone too far down towards the end of the airstrip to permit the gaining of necessary and proper flying airspeed and become again safely airborne before the plane reached the far end of the airstrip.

5. That the life rafts in the aircraft were stowed aboard it in such a manner that they were inaccessible when emergently needed by the passengers in that they were stowed in places other than those designated, and as to which places the passengers were not informed; and, also, other life-saving equipment in the airplane was placed at locations in the airplane not in conformity with the statements in such literature as was on the plane, and no other information was given or available to be given to the passengers as to the actual location of such other equipment.

6. That the defendant failed to effectuate any precautionary or safety procedure for emergency landing, despite the fact that the plane was operating on only three engines and was attempting to make a night landing on an airstrip unfamiliar to the pilot, and, under all the circumstances of a snow-covered airstrip and impaired plane maneuverability due to lessened engine power which surrounded the pilot at the time he was attempting to effect the landing of the plane, the airstrip was not suited for and was an unsafe landing place for use by this airplane.

7. That such impairments of snow cover upon the airstrip and of less maneuverability of the airplane because of loss of engine power brought into

focus and made more potent the influences surrounding the pilot trying to make the landing which related to the pilot's unfamiliarity with the characteristics of the airfield.

8. That defendant and its pilot were further negligent in causing this crippled airplane to resume its flight and to depart from the last airfield on which it was safely landed, in view of all the flying conditions surrounding it and of the history of its No. 1 engine's excessive oil consumption, in view of the fact that it was known to the defendant and its pilot in charge of the flight that the next airfield at which this plane was scheduled to land was too far away from the field from which the last departure of the plane was made to justify the risk of uncertainty as to how long a four-engine plane like that on this flight could safely fly without misfortune if one of its engines should go out of commission on such a long flight, and in view of the fact that the aircraft could not reasonably expect to land if necessary at unfamiliar or familiar airfields with the same facility and ease or success with which it might be landed at such fields if all four engines were in operation and in proper condition.

9. Finally, that the defendant was further negligent in failing to give to the passengers, including the decedent Waldrep and the plaintiff Maynard, specific safety instructions and related information much needed and more emergently needed after the plane crashed and came in contact with the sea water and after the plane lay partly submerged in

the water, and failed to expedite rescue operations.

That as a proximate result of such negligence of the defendant and its pilot the decedent Waldrep lost his life as alleged and by reason of such wrongful death the plaintiff is entitled to recover as administratrix in the Gorter case for the benefit of the decedent's minor child for whose benefit that action was filed and is now pending.

In the Gorter case, respecting the amount of damages to be allowed to plaintiff on account of the wrongful death of the decedent Waldrep, the Court from a preponderance of the evidence finds, concludes and decides that, although the decedent was youthful, he was devoted to his wife and their future child born only a few days after his death, and had a serious and definite intention to provide suitable and adequate support and care for them; that he had while at home from public service gone to school to better prepare for military service and other useful work and intended to complete his schooling; that he had advanced in military rank to that of Sergeant First Class in the United States Army, his rating when his death occurred, receiving therefor base pay of grade "E-6" with extra overseas duty pay and other allowances, all amounting to more than \$300.00 monthly; that at the time of his death he was as usual in normal good health and expected to so continue permanently in the future with as good as and better earnings than he had received as Sergeant First Class; and

That the decedent father was and was likely to continue to be permanently in the future amply

able to provide suitable, expensive and valuable support, care and education for his minor daughter Judith Ann throughout her minority; that she will need very substantial sums of money to meet the valuable education and training to which she was entitled from her father; that she is now an admirable little girl of about five years of age who at the time of her appearance in court during this trial convinced the Court that she is an intelligent child with an attractive personality and with bright prospects for future accomplishment, and the evidence is convincing that she is gifted in her music and school interests and generally she seems to be a child whose proper support, care and education will be of great value to her and would have been correspondingly expensive to her deceased father had he lived to provide it; that his obligation to provide for her such proper support, care and education is not made less valuable because of any existing danger of selfish or wasteful mismanagement by those likely to administer any money relief recovered for her benefit in this court. On the contrary, the Court is convinced by the evidence that any such relief will be used for her basic needs under guidance of Judith Ann's trustworthy relatives, including her mother's sister, Mrs. Bloth, who is a very intelligent, experienced and capable businesswoman and mother of her own young teenage daughter.

That from a preponderance of the evidence the Court finds, concludes and decides that in the Gorter case the decedent's estate and the plaintiff for

the benefit of decedent's minor daughter are entitled to recover from defendant the total sum of \$40,000.00 on account of decedent's wrongful death.

That as to the plaintiff Maynard, and from a preponderance of the evidence, the Court finds, concludes and decides that the defendant take nothing on account of its affirmative defenses, and that the plaintiff Maynard has sustained material injuries and damages in part as alleged in his complaint as amended.

That, however, the plaintiff Maynard's injuries are much less serious in nature and extent than were experienced by a number of other passengers. That as a passenger on the crashed airplane he suffered a great deal of pain and anguish by reason of the chill resulting from the immersion of his feet and legs for a number of hours in that cold ocean water into which the airplane crashed near Sandspit, British Columbia, on the day and at the time of this accident, and his blood circulation was damaged and he suffered in body and mind from the trauma of such water chill and exposure and from the not too important surface abrasions received by him on and about his person, and was thereby disabled for several days, during part of which time he received medical and hospital treatment and care.

That he was discharged from military service within a reasonable time after the accident which is the subject of this litigation, and, so far as the proof shows, that discharge from military service at that time was without medical incident. There

is no evidence that the plaintiff Maynard claimed or that he was diagnosed as having any physical impairment at that time on account of anything alleged in this action.

The Court is not strongly impressed by the testimony of the plaintiff Maynard regarding the symptoms which he says he has experienced in the following years of his military re-enlistments and has continued, according to his contentions, to experience up to this time.

The most outstanding fact bearing upon whether or not he continues or has continued to experience trouble with his blood circulation since his discharge from the military service next following this accident is that no attending physician regularly treating or examining him in the course of his daily life has ever noted any cause for treatment or has treated him for any bad effects of this accident so far as the proof in this case shows.

That, nevertheless, the plaintiff Maynard did sustain substantial damages, and from a preponderance of the evidence the Court finds, concludes and decides that for all his injuries, pain and suffering which he experienced as a direct and proximate result of the defendant's negligence alleged in plaintiff Maynard's complaint, he has sustained injuries and damages in the total sum of \$2,500.00, for all of which he is entitled to recover against the defendant.

In each case, the Gorter case and also in the Maynard case, the plaintiff will be awarded her and his taxable costs against the defendant.

Mr. Koch: May I ask under which count the Court is entering judgment in the wrongful death action?

The Court: Answering specifically the question last stated, the Court does make the findings, conclusions and decision and determination and award of damages announced already in the Gorter case in respect to plaintiff's so-called first count.

I ask counsel on both sides if either contends that the Court cannot legally deny recovery in respect to the second count and the third count without, by the mere denial of recovery as to each, acting inconsistently with the Court's allowance of recovery on the first count.

Mr. Koch: The prayer says——

The Court: My understanding is there is no such inconsistency. What is your theory?

Mr. Koch: That is my belief.

The Court: In other words, that each of the second and third counts is alternative with the first?

Mr. Koch: That is what it states.

The Court: In the Gorter case, the recovery is allowed in respect to only Count I. There is no recovery allowed in respect to Count II or Count III.

As to the Maynard case, is there any similar situation in that?

Mr. Riley: I don't believe there would be, because it is not separated in counts.

The Court: There is no separation of counts. There is only one cause of action.

Mr. Koch: Your Honor, the reason I called this

matter to the Court's attention is because under the second count, which is the Warsaw Convention, there is a limitation of liability where the maximum recovery is \$8,300.00.

The Court: The Court has already disposed of it, as I understand it. No recovery is allowed on the second count or the third count.

Mr. Koch: The second count, the Warsaw Convention, does not apply?

The Court: The Court does not grant any relief on the second count, nor on the third count.

Wherever conflict occurs between the pre-trial order and the rulings of the Court during the trial, the latter will prevail.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial before the above entitled court, the Honorable John C. Bowen, Judge, on the 21st day of March, 1957. Plaintiff appeared by her attorneys, John W. Riley, and Williams & Kinnear, Ronald A. Murphy of counsel. Defendant appeared by its attorneys, Karr, Tuttle & Campbell, Carl G. Koch and Payne Karr of counsel.

On April 17, 1957, plaintiff and defendant each concluded their respective causes in chief, rebuttal

and surrebuttal respectively, offering no further evidence.

The court having considered the records, files and pleadings, the exhibits and testimony of all the witnesses and the arguments of counsel, now makes the following

Findings of Fact

1. That the plaintiff, Geraldine Gorter is the duly qualified and acting administratrix of the estate of the decedent, John M. Waldrep and authorized to bring this action under and by virtue of the laws of the State of Washington.

2. That the decedent, John M. Waldrep, an American citizen died on the 19th day of January, 1952, in the crash of an airplane operated by defendant Northwest Airlines, Inc., at a point in salt water more than a half mile out seaward from low water mark and off shore of Sandspit, British Columbia, Dominion of Canada. At the time of the death of decedent he was survived by his wife, Faye Waldrep, an American citizen, who thereafter on January 22, 1952, bore decedent's child, Judith Anne Waldrep, which child was and is the lawful issue of decedent and his marriage to the said Faye Waldrep. Prior to the commencement of this action and subsequent to the death of decedent, John M. Waldrep, the said Faye Waldrep died leaving the said minor child, Judith Anne Waldrep an orphan in the care of relatives. The said minor child is the only surviving issue and dependent of the decedent, John M. Waldrep.

3. Defendant is a corporation of the State of

Minnesota, of which it is a citizen, doing business in the State of Washington, within the jurisdiction of this court. At the time of his death, the decedent, John M. Waldrep was a passenger on one of the defendant's aircraft designated as "Flight 324" of defendant, Northwest Orient Airlines of January 19, 1952. The said flight was being performed by employees of the defendant Northwest Airlines operating a Douglas DC-4 aircraft, serial number 45342. Decedent had boarded the defendant's said aircraft in Tokyo, Japan on January 17, 1952, enroute to McChord Air Force Base in Tacoma, Washington via Shemya, Aleutian Islands, and Anchorage, Alaska.

4. On the morning of January 19, 1952, at a point approximately 75 miles southwest of Sitka, Alaska, the number 1 engine on defendant's said aircraft failed in flight after the said aircraft had departed Anchorage, Alaska, enroute to the Seattle, Washington area. The pilot of the said aircraft thereupon proceeded to Sandspit, British Columbia which was a point approximately one and three quarters hours flying time from the said place of engine failure, to attempt an emergency landing.

5. The death of decedent, John M. Waldrep was, as alleged by plaintiff, the direct and proximate result of the crash of defendant's said aircraft, which was directly and proximately caused wrongfully and negligently by reason of acts of negligence, omissions and misconduct of the defendant.

6. That the defendant was guilty of wrongful

omissions and misconduct and was negligent in the following respects and particulars, to-wit:

a. That the No. 1 engine on the aircraft on which the decedent Waldrep was a passenger was negligently inspected and maintained by the defendant.

b. That the safety literature kept in the aircraft for distribution to passengers was inadequate and related to a configuration of aircraft different from the aircraft in use on the flight here in question.

c. That safety equipment different from that mentioned in the literature was in use upon this aircraft.

d. That such literature as was available for distribution to the passengers was not in fact distributed among all of them, nor as directed in the literature itself and in the defendant's corporate and business requirements.

e. That defendant negligently failed to distribute the literature to and among the passengers, including the decedent Waldrep.

f. That the defendant violated applicable rules and regulations and also the defendant's company regulations in that the defendant negligently did not consult with and advise the pilot in his preparation for landing following the loss and going out of commission of the No. 1 engine here in question.

g. That defendant's pilot was negligent in first landing the aircraft too far down the runway at Sandspit, British Columbia, and then thereafter attempting to take the airplane off again into the air at a point on the airstrip when the plane had

gone too far down towards the end of the airstrip to permit the gaining of necessary and proper flying airspeed and become again safely airborne before the plane reached the far end of the airstrip.

h. That the life rafts in the aircraft were stowed aboard it in such a manner that they were inaccessible when emergently needed by the passengers in that they were stowed in places other than those designated, and as to which places the passengers were not informed; and, also, other lifesaving equipment in the airplane was placed at locations in the airplane not in conformity with the statements in such literature as was on the plane, and no other information was given or available to be given to the passengers as to the actual location of such other equipment.

i. That the defendant failed to effectuate any precautionary or safety procedure for emergency landing, despite the fact that the plane was operating on only three engines with impaired maneuverability, attempting to make a night landing on an airstrip unfamiliar to the pilot, which was snow-covered and was not suited for and was an unsafe landing place for use by this airplane.

j. That defendant and its pilot were further negligent in causing this crippled airplane to resume its flight and to depart from Anchorage, Alaska, which was the last airfield on which it was safely landed, in view of all the flying conditions surrounding it and of the history of its No. 1 engine's excessive oil consumption.

k. That the defendant was further negligent in

failing to give to the passengers, including the decedent Waldrep, specific safety instructions and related information much needed and more emergently needed after the plane crashed and came in contact with the sea water and after the plane lay partly submerged in the water.

1. That defendant failed to expedite rescue operations after the crash or to alert rescue facilities when informed that the said aircraft was in an emergency status after failure of its No. 1 engine.

7. That during said flight and at the time of said crash the aircraft was in the sole and exclusive control of the defendant and that at such time and place the defendant was performing services for the United States Government as an independent contractor and not as agent of the United States Government.

8. That as an affirmative defense to complaint of the plaintiff in Count I, the defendant has pleaded certain sections of an act designated as "The British Columbia Families Compensation Act", as a possible bar to the plaintiff's cause of action. That the defendant has not sustained, by preponderance of the evidence in this case, sufficient facts to sustain such defense. That under the evidence in this case the said British Columbia Families Compensation Act does not apply to a cause of action arising out of a death occurring by reason of an accident happening seaward of low water, off shore of British Columbia, and the time limit of one year for bringing suit under that Act does not apply here. No other applicable law having been adequately

pleaded or proven, the law to be applied by this court to Count 1 of plaintiff's complaint is the law of the State of Washington relative thereto.

9. That the defendant has failed to sustain by preponderance of evidence in this case, facts necessary to support the allegations of their affirmative defenses as to Count I of the plaintiff's complaint. But on the contrary, the court finds that:

a. That defendant's said aircraft was in the sole and exclusive control of the defendant.

b. That defendant was performing services for the United States Government as an independent contractor and not as a mere agent of the United States Government.

c. That decedent John M. Waldrep did not assume the peril of any of the acts of negligence and misconduct of defendant set forth herein.

d. That defendant and its agents failed to take any and all necessary measures to avoid the damages to plaintiff.

e. That defendant failed to prove by the preponderance of the evidence any law other than the Wrongful Death Act of the State of Washington which would be applicable to this cause of action.

10. That decedent, J. M. Waldrep, although youthful, was devoted to his wife and their future child born only a few days after his death, and had a serious and definite intention to provide suitable and adequate support and care for them; that he had, while at home from public service, gone to school to better prepare for military service and other useful work and intended to complete his

schooling; that he had rapidly advanced in military rank to Sergeant First Class in the United States Army, his rating when his death occurred, receiving therefor base pay of grade "E-6" with extra overseas duty pay and other allowances, all amounting to more than \$300.00 monthly; that at the time of his death he was as usual in normal good health and expected to so continue permanently in the future with as good as and better earnings than he had received as Sergeant First Class; and

That the decedent father was and was likely to continue to be permanently in the future amply able to provide suitable, expensive and valuable support, care and education for his minor daughter, Judith Anne, throughout her minority; that she will need very substantial sums of money to meet the valuable education and training to which she was entitled from her father; that she is now an admirable little girl of about five years of age who at the time of her appearance in court during this trial convinced the Court that she is an intelligent child with an attractive personality and with bright prospects for future accomplishment, and the evidence is convincing that she is gifted, that generally she seems to be a child whose proper support, care and education will be of great value to her and would have been correspondingly expensive to her deceased father had he lived to provide it; that his obligation to provide for her such proper support, care and education is not made less valuable because of any existing danger of selfish or wasteful mismanagement by those likely to admin-

ister any money relief recovered for her benefit in this court.

12. That the value of the loss of support, and the loss of parental care, love and guidance sustained by decedent's daughter, Judith Anne Waldrep, by virtue of the death of the said decedent at the time of the birth of the said Judith Anne Waldrep was and is the sum of Forty Thousand Dollars (\$40,000.00).

From the foregoing Findings of Fact, the court makes the following

Conclusions of Law

1. That this court has jurisdiction of the subject matter and all parties involved in this proceeding.

2. That Geraldine B. Gorter is the duly qualified and acting administratrix of the estate of John M. Waldrep, deceased, and is entitled to bring this action according to the laws of the State of Washington.

3. That Judith Anne Waldrep is the sole lineal heir and beneficiary of the estate of John M. Waldrep according to the laws of the State of Washington.

4. Under the evidence produced in this case, the Wrongful Death Act of the State of Washington, Chapter 20, Title 4, R.C.W. Laws of the State of Washington *in* applicable to the above entitled action.

5. That according to the laws of the State of

Washington plaintiff is entitled to recover for the use and benefit of the decedent's said daughter, Judith Anne Waldrep, the value at the time of her birth of the loss of support and the loss of parental care, love and guidance which decedent would have provided her at the time of her birth.

6. That plaintiff is entitled to judgment, pursuant to Count 1 of plaintiff's complaint against the defendant in the sum of Forty Thousand Dollars (\$40,000.00), and for her costs and disbursements herein.

7. That in view of said conclusions, plaintiff recover nothing under Counts II and III of her complaint.

Done in Open Court this 15th day of May, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ JOHN W. RILEY,
Of Counsel,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 15, 1957.

In the District Court of the United States, Western
District of Washington, Northern Division

Civil Cause No. 3695

GERALDINE B. GORTER, as Administratrix of
the Estate of John M. Waldrep, Deceased,
Plaintiff,

vs.

NORTHWEST AIRLINES, INC., Defendant.

JUDGMENT

Be it remembered, that this matter came on regularly for trial on the 21st day of March, 1957, before the undersigned Judge of the above entitled court and the cause being consolidated for trial with the case of H. D. Maynard vs. Northwest Airlines, Inc., Civil Cause No. 3872, and the plaintiff appearing by her attorneys, John W. Riley, and Williams & Kinnear, Ronald A. Murphy of counsel and the defendant appearing by its attorneys, Karr, Tuttle & Campbell, Carl G. Koch and Payne Karr of counsel, and the witnesses having been sworn and testimony and exhibits having been introduced, the court having considered the proofs offered and having heard argument of counsel and being fully advised in the facts and premises and having announced its oral decision at the conclusion of the trial, and having signed and entered its findings of fact and conclusions of law herein, now, therefore, it is

Ordered, Adjudged and Decreed that plaintiff have and recover and is hereby awarded judgment against the defendant, in the sum of Forty Thousand Dollars (\$40,000.00), and for her costs and disbursements herein.

Done in Open Court this 15th day of May, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ JOHN W. RILEY, of Counsel, Attorneys for
Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the above-entitled Court, the Honorable John C. Bowen, Judge, on the 21st day of March, 1957. Plaintiff appeared by her attorneys, John W. Riley, and Williams & Kinnear, Ronald A. Murphy of counsel. Defendant appeared by its attorneys, Karr, Tuttle & Campbell, Carl G. Koch and Payne Karr of counsel.

On April 17, 1957, plaintiff and defendant each concluded their respective causes in chief, rebuttal and sur-rebuttal respectively, offering no further evidence.

The court having considered the records, files and pleadings, the exhibits and testimony of all the witnesses now makes the following

Findings of Fact

1. That the plaintiff, Geraldine Gorter, is the duly qualified and acting administratrix of the estate of the decedent, John M. Waldrep, and authorized to bring this action under and by virtue of the laws of the State of Washington.

2. That the decedent, John M. Waldrep, an American citizen, died on the 19th day of January, 1952, in the crash of an airplane leased by defendant Northwest Orient Airlines, Inc. from Trans World Airlines, Inc. and operated by defendant at a point in salt water more than a half mile out seaward from low water mark not within British Columbia, Dominion of Canada, but near Sandspit, British Columbia. At the time of the death of decedent he was survived by his wife, Faye Waldrep, an American citizen, who then bore decedent's child. Judith Anne Waldrep was born on January 22, 1952, and was and is the lawful issue of decedent and his marriage to the said Faye Waldrep. Prior to the commencement of this action and subsequent to the death of decedent, John M. Waldrep, the said Faye Waldrep died leaving the said minor child, Judith Anne Waldrep, an orphan in the care of relatives. The said minor child is the only surviving issue and dependant of the decedent, John M. Waldrep.

3. Defendant is a corporation organized and existing under and by virtue of the laws of Minne-

sota, doing business in the State of Washington, within the jurisdiction of this court. At the time of his death, the decedent, John M. Waldrep, was a passenger on said aircraft designated as "Flight 324" of defendant, Northwest Orient Airlines, Inc., of January 19, 1952. The said flight was being performed by employees of the defendant Northwest Orient Airlines, Inc. operating a Douglas DC-4 aircraft, serial number 45342. Decedent had boarded the defendant's said aircraft in Tokyo, Japan on January 17, 1952, enroute to McChord Air Force Base in Tacoma, Washington, via Shemya, Aleutian Islands, and Anchorage, Alaska.

4. On the morning of January 19, 1952, at a point approximately 75 miles southwest of Sitka, Alaska, the number 1 engine on said aircraft failed in flight after the said aircraft had departed Anchorage, Alaska, enroute to the Seattle, Washington area. The pilot of the said aircraft thereupon proceeded to Sandspit, British Columbia, which was a point approximately ... miles from the said place of engine failure, to attempt an emergency landing.

5. The death of decedent, John M. Waldrep, was, as alleged by plaintiff, the direct and proximate result of the crash of said aircraft, which was directly and proximately caused wrongfully and negligently by reason of acts of negligence, omissions and misconduct of the defendant.

6. That the defendant was guilty of wrongful omissions and misconduct and was negligent in the following respects and particulars, to-wit:

a. That the No. 1 engine on the aircraft on

which the decedent Waldrep was a passenger was negligently inspected and maintained by the defendant.

b. That the safety literature kept in the aircraft for distribution to passengers was inadequate and related to a configuration of aircraft different from the aircraft in use on the flight here in question.

c. That safety equipment different from that mentioned in the literature was in use upon this aircraft.

d. That such literature as was available for distribution to the passengers was not in fact distributed among them, nor as directed in the literature itself and in the defendant's corporate and business requirements.

e. That defendant negligently failed to distribute the literature to and among the passengers, including the decedent Waldrep.

f. That the defendant violated the Civil Aeronautics regulations and also the defendant's company regulations in that the defendant negligently did not consult with and advise the pilot in his preparation for landing following the loss and going out of commission of the No. 1 engine here in question.

g. That defendants pilot was negligent in first landing the aircraft too far down the runway at Sandspit, British Columbia, and then thereafter attempting to take the airplane off again into the air at a point on the airstrip when the plane had gone too far down towards the end of the airstrip to permit the gaining of necessary and proper flying airspeed and become again safely

airborne before the plane reached the far end of the airstrip.

h. That the life rafts in the aircraft were stowed aboard it in such a manner that they were inaccessible when emergently needed by the passengers in that they were stowed in places other than those designated, and as to which places the passengers were not informed; and, also, other lifesaving equipment in the airplane was placed at locations in the airplane not in conformity with the statements in such literature as was on the plane, and no other information was given or available to be given to the passengers as to the actual location of such other equipment.

i. That the defendant failed to effectuate any precautionary or safety procedure for emergency landing, despite the fact that the plane was operating on only three engines with impaired maneuverability, attempting to make a night landing on an airstrip unfamiliar to the pilot, which was snow-covered and was not suited for and was an unsafe landing place for use by this airplane.

j. That defendant and its pilot were further negligent in causing this crippled airplane to resume its flight and to depart from Anchorage, Alaska, which was the last airfield on which it was safely landed, in view of all the flying conditions surrounding it and of the history of its No. 1 engine's excessive oil consumption.

k. That the defendant was further negligent in failing to give to the passengers, including the decedent Waldrep, specific safety instructions and

related information much needed and more emergently needed after the plane crashed and came in contact with the sea water and after the plane lay partly submerged in the water.

1. That defendant failed to expedite rescue operations after the crash or to alert rescue facilities when informed that the said aircraft was in an emergency status after failure of its No. 1 engine.

7. That as an affirmative defense to the complaint of the plaintiff in Count I, the defendant has pleaded and proved sections 3 and 5 of the British Columbia wrongful death statute in effect January 19, 1952, entitled "The British Columbia Families' Compensation Act." That section 5 of said act provides that wrongful death actions must be commenced within one year from the date of death. That decedent Waldrep died January 19, 1952, and plaintiff's cause of action was not commenced until January 18, 1954. That nevertheless defendant has not sustained its said affirmative defense by a preponderance of the evidence in this case and accordingly the time limitation provision of the British Columbia Families' Compensation Act is not a bar to the maintenance of plaintiff's cause of action. That under the British Columbia law the British Columbia Families' Compensation Act does not apply to a cause of action for wrongful death caused by an accident occurring seaward of low water mark near Sandspit, British Columbia. No other wrongful death statute has been pleaded or proved by defendant. Plaintiff has alleged and proved the wrongful death statute of

the State of Washington contained in R.C.W. 4.20.

8. That the defendant has failed to sustain by preponderance of the evidence in this case, facts necessary to support the allegations of their other affirmative defenses as to Count I of the plaintiff's complaint. Particularly the court finds that:

a. That said aircraft was in the sole and exclusive control of the defendant.

b. That defendant was performing services for the United States Government as an independent contractor and not as a mere agent of the United States Government.

c. That decedent John M. Waldrep did not assume the peril of any of the acts of negligence and misconduct of defendant set forth herein.

d. That defendant and its agents failed to take all necessary measures to avoid the damages to plaintiff.

e. That under the evidence in this case there was not any law apart from the Wrongful Death Act of the State of Washington under which this cause of action could be maintained.

9. That decedent, J. M. Waldrep, although youthful, was devoted to his wife and their future child born only a few days after his death, and had a serious and definite intention to provide suitable and adequate support and care for them; that he had, while at home from public service, gone to school to better prepare for military service and other useful work and intended to complete his schooling; that he had rapidly advanced in

military rank to Sergeant First Class in the United States Army, his rating when his death occurred, receiving therefor base pay of grade "E-6" with extra overseas duty pay and other allowances, all amounting to more than \$300.00 monthly; that at the time of his death he was as usual in normal good health and expected to so continue permanently in the future with as good as and better earnings than he had received as Sergeant First Class; and

That the decedent father was and was likely to continue to be permanently in the future amply able to provide suitable, expensive and valuable support, care and education for his minor daughter, Judith Anne, throughout her minority; that she will need very substantial sums of money to meet the valuable education and training to which she was entitled from her father; that she is now an admirable little girl of about five years of age who at the time of her appearance in court during this trial convinced the Court that she is an intelligent child with an attractive personality and with bright prospects for future accomplishment, and the evidence is convincing that she is gifted, that generally she seems to be a child whose proper support, care and education will be of great value to her and would have been correspondingly expensive to her deceased father had he lived to provide it; that his obligation to provide for her such proper support, care and education is not made less valuable because of any existing danger or selfish or wasteful mismanagement by those likely

to administer any money relief recovered for her benefit in this court.

10. That the value of the loss of support, and the loss of parental care, love and guidance sustained by decedent's daughter, Judith Anne Waldrep, by virtue of the death of the said decedent at the time of the birth of the said Judith Anne Waldrep was and is the sum of Forty Thousand Dollars (\$40,000.00).

11. That the facts necessary to make the Warsaw Convention applicable to said Flight 324, on which decedent Waldrep was a passenger, or to entitle plaintiff to maintain an action based upon the contract between defendant and the United States Government have not been proved by a preponderance of the evidence.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

1. That this court has jurisdiction of the subject matter and all parties involved in this proceeding.

2. That Geraldine B. Gorter is the duly qualified and acting administratrix of the estate of John M. Waldrep, deceased, and is entitled to bring this action according to the laws of the State of Washington.

3. That Judith Anne Waldrep is the sole lineal heir and beneficiary of the estate of John M. Waldrep according to the laws of the State of Washington.

4. That the Wrongful Death Act of the State

of Washington, Chapter 20, Title 4, R.C.W. Laws of the State of Washington is applicable to the above-entitled action.

5. That according to the laws of the State of Washington plaintiff is entitled to recover for the use and benefit of the decedent's said daughter, Judith Anne Waldrep, the value at the time of her birth of the loss of support and the loss of parental care, love and guidance which decedent would have provided her at the time of her birth.

6. That plaintiff is entitled to judgment, pursuant to Count 1 of plaintiff's complaint against the defendant in the sum of Forty Thousand Dollars (\$40,000.00), and for her costs and disbursements herein.

7. That plaintiff is entitled to recover nothing under Counts II and III of her complaint.

Done in Open Court this day of May, 1957.

.....,

Judge

The Court respectfully declines to make or enter the foregoing requested Findings and Conclusions to the extent that they are different from those other ones this day made and entered herein.

May 15, 1957.

/s/ JOHN C. BOWEN,

Judge

Acknowledgment of Service attached.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

COST BILL

Disbursements

I. Clerk's Fees

Roberta Lucas, County Clerk, Walla Walla County, copies of Letters of Administration: Amount claimed, \$3.00; amount allowed, \$3.00.

Filing Complaint and Summons: Amount claimed, \$15.00; amount allowed, \$15.00.

II. Attorney's Fees

Attorney's Docket fees: Trial: Amount claimed, \$20.00; amount allowed, \$20.00.

Depositions admitted in evidence: (a) Donald A. Baker: Amount claimed, \$2:50; disallowed. (b) LeRoy Waldrep: Amount claimed, \$2.50; disallowed.

III. Deposition Costs

Mr. Orin E. Gray, Court Reporter, Deposition of Donald E. Baker, December 8, continued to December 12, 1956: Amount claimed, \$90.20; amount allowed, \$40.20.

Bernice Youngblood, Court Reporter, Deposition of LeRoy Waldrep, Jasper, Alabama, March 1, 1957: Amount claimed, \$51.00; amount allowed, \$40.00.

IV. Witness Fees and Mileage

Mrs. Fern Bloth, address, Alamagordo, New Mexico, mileage 200: Amount claimed, \$16.00; amount allowed, \$16.00. One day's attendance, two days enroute: Amount claimed \$12.00; amount al-

lowed, \$12.00. Subsistence: Amount claimed \$15.00; amount allowed, \$15.00.

Mr. Robert Lewis, address, Seattle, Washington, one day's attendance: Amount claimed \$4.00; disallowed.

Mr. Charles E. Smith, address, Seattle, Washington, one day's attendance: Amount claimed, \$4.00; disallowed. Mileage 8: amount claimed, \$.64; disallowed.

Witness fee, on Subpoena Duces Tecum, to Northwest Airlines, address, Seattle, Washington, one day's attendance: Amount claimed, \$4.00; disallowed; mileage 8: Amount claimed, \$.64; disallowed.

John R. Cunningham, address, Vancouver, British Columbia, Canada, two day's attendance: Amount claimed, \$8.00; amount allowed, \$8.00. Subsistence: Amount claimed, \$10.00; amount allowed, \$8.00. Transportation, first class Airlines, 220 miles at 8c per mile: Amount claimed, \$18.81; amount allowed, \$17.60.

V. Miscellaneous

Transcripts necessarily obtained for use George F. Cropp, excerpt of proceedings: Amount claimed, \$28.78; disallowed.

Patricia Stewart, extract of testimony on Court's decision: Amount claimed \$8.25; disallowed.

George F. Cropp, transcript of proceedings: Amount claimed, \$9.60; disallowed.

Fees for obtaining photographs necessary for

use: Photographs of DC-4 type airplane: Amount claimed, \$10.00; disallowed.

Fees for exemplification and copies of papers necessarily obtained for use in case: Photostats of Northwest Airlines records for exhibits in evidence: Amount claimed, \$48.40; disallowed.

Total: Amount claimed, \$382.32; amount allowed, \$194.80.

Taxed May 20, 1957.

/s/ MILLARD P. THOMAS,
Clerk

United States of America,
Western District of Washington—ss.

Ronald A. Murphy, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

/s/ RONALD A. MURPHY

Subscribed and sworn to before me this 16th day of May, 1957.

[Seal] /s/ MORELL E. SHARP,
Notary Public in for the State of Washington,
residing at Seattle.

To: Karr, Tuttle and Campbell, Attorneys for Defendant Northwest Airlines, Inc.

You will please take notice that on Monday, the 20th day of May, 1957, at the hour of 11:00 o'clock a.m., application will be made to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

WILLIAMS & KINNEAR,
/s/ RONALD A. MURPHY,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed May 16, 1957.

[Title of District Court and Cause.]

**MOTION FOR NEW TRIAL; MOTION TO RE-
OPEN FOR FURTHER EVIDENCE; MO-
TION FOR LEAVE TO AMEND DEFEND-
ANT'S ANSWER**

Defendant respectfully moves the Court for an order granting a new trial in the above-entitled cause upon the following grounds:

1. Surprise which ordinary prudence could not have guarded against;
2. Excessive damages appearing to have been given under the influence of passion or prejudice;
3. Insufficiency of the evidence to justify the Court's findings; and
4. Error in law occurring at the trial consisting

of the Court's refusal to permit Mr. John Bird, one of defendant's witnesses, to testify that the British Columbia Families' Compensation Act was the sole and exclusive law under which an action by plaintiff could have been predicated, and that there was no other law applicable creating a cause of action for wrongful death.

Defendant renews its motion to re-open for further evidence of the law applicable to the facts of this case and its motion for leave to amend defendant's answer, which motions are on file herein.

These motions are made and based upon the pleadings and all other records and files herein, the minutes of the Court, and the affidavit of Carl G. Koch made in connection with defendant's previous motion for leave to amend defendant's answer, and motion to re-open for further evidence, which affidavit is on file herein.

KARR, TUTTLE & CAMPBELL,
/s/ CARL G. KOCH,

Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1957.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
FOR NEW TRIAL, DEFENDANT'S MO-
TION TO AMEND ANSWER AND DE-
FENDANT'S MOTION TO RE-OPEN

Hearings on defendant's Motion for New Trial, Motion to Amend Answer and Motion to Re-Open came on regularly for hearing before the undersigned Judge of the above entitled court. Defendant appeared by its counsel, Karr, Tuttle & Campbell, Carl Koch and Coleman Hall of counsel plaintiff appeared by her attorneys, Williams & Kinnear, Ronald A. Murphy of counsel and John W. Riley.

Findings of Fact and Conclusions of Law and Judgment in the above entitled cause having been entered heretofore and having considered defendant's said motions filed herein and affidavits in support thereof; having considered arguments of all counsel desiring to be heard and being fully advised,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That defendant's motion for leave to amend its answer shall be and hereby is Denied:
2. That defendant's motion for leave to re-open shall be and hereby is Denied: and
3. That defendant's motion for a new trial,

shall be and hereby is Denied as to each and all of the grounds set forth therein.

Done in Open Court this 20th day of May, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented and Approved for entry:

/s/ JOHN W. RILEY, for Plaintiff.

Approved as to Form:

Karr, Tuttle & Campbell. By Carl G. Koch,
Attorneys for Defendant.

[Endorsed]: Filed May 20, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that Northwest Orient Airlines, Inc., a corporation, defendant above named, hereby appeals to the United States Court of Appeals, Ninth Circuit, from the final Judgment entered in this action on May 15, 1957.

Dated this 22nd day of May, 1957.

/s/ CARL G. KOCH,

KARR, TUTTLE & CAMPBELL,
Attorneys for Defendant.

[Endorsed]: Filed May 22, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON
APPEAL

Know All Men by These Presents:

That we, Northwest Orient Airlines, Inc., a corporation organized and existing under and by virtue of the laws of the State of Minnesota, as principal and Federal Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and duly authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Geraldine B. Gorter, as Administratrix of the Estate of John M. Waldrep, Deceased, the plaintiff above named, in the just and full sum of Fifty Thousand and no/100 Dollars (\$50,000.00), for which sum well and truly to be paid we bind ourselves and our respective successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that whereas the above-named plaintiff on the 15th day of May, 1957, in the above-entitled action and court, recovered judgment against the defendant in the sum of \$40,000.00, together with her costs and disbursements taxable herein, and

Whereas the above-named principal has heretofore given due and proper notice that it appeals from said decision and judgment of said United States District Court.

Now, Therefore, if the principal, Northwest Orient Airlines, Inc., shall pay to Geraldine B.

Gorter, as Administratrix of the Estate of John M. Waldrep, Deceased, the plaintiff above named, all costs and damages that may be awarded against the said principal on appeal or dismissal thereof, and shall satisfy the judgment appealed from in full, together with costs and interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof we have hereunto subscribed our names and affixed our seals this 22nd day of May, 1957.

NORTHWEST ORIENT AIRLINES,
INC.,

/s/ By CARL G. KOCH,
Its Attorney.

[Seal] FEDERAL INSURANCE COMPANY,

/s/ By WILLIAM S. BUCKNALL,
Its Attorney in Fact and Resident
Agent.

Approved this 22nd day of May, 1957 as to form
and amount.

WILLIAMS & KINNEAR,
JOHN W. RILEY,

/s/ By RONALD A. MURPHY,
Attorneys for Plaintiff.

Approved this 22nd day of May, 1957.

/s/ JOHN C. BOWEN,
Judge.

[Endorsed]: Filed May 22, 1957.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice Is Hereby Given that Northwest Orient Airlines, Inc., a corporation, defendant above named, hereby appeals to the United States Court of Appeals, Ninth District, from the final Judgment entered in this action on May 15, 1957, and from the Order Denying Defendant's Motion for a New Trial, Denying Defendant's Motion to Amend Its Answer and Denying Defendant's Motion to Re-Open for Further Testimony entered May 20, 1957.

Dated this 28th day of May, 1957.

/s/ CARL G. KOCH,
KARR, TUTTLE & CAMPBELL,
Attorneys for Defendant.

[Endorsed]: Filed May 31, 1957.

[Title of District Court and Cause.]

STIPULATION AS TO PORTION OF PROCEEDINGS AND EVIDENCE NOT MATERIAL TO ISSUES ON APPEAL

Attached is Statement of Points on Which Appellant Intends to Rely on Appeal, prepared pursuant to the provisions of Rule 75 of the Rules of Civil Procedure, which appellant will file in the above captioned cause in accordance with said Rule

75 provided the following stipulation is entered into by and between counsel for appellant and appellee:

It Is Hereby Stipulated that the evidence and testimony of the following witnesses are not material or relevant to the issues on appeal as specified in the concise statement of points upon which appellant intends to rely on appeal, and that said evidence and testimony shall not be designated by appellant or appellee to be included in the portions of the records, proceedings and evidence to be contained in the record on appeal: Dr. A. H. Seering, Dr. Alfred Sheridan, Dr. Paul Ruuska, and (by deposition) Earle Conwell.

It Is Further Stipulated that, except for the evidence and testimony of the witnesses specifically excluded by the foregoing paragraph, appellant shall designate all the rest and remainder of the reporter's transcript of the evidence or proceedings in the above captioned cause.

It is understood and agreed that, with the exception of the deposition of Earle Conwell which shall not be designated by appellant or appellee to be contained in the record on appeal, this stipulation relates only to the reporter's transcript of the evidence and proceedings in the above captioned cause, and this stipulation does not cover or relate to the portions of the record contained in the original file in this cause in the office of the Clerk of the above captioned Court, nor to the exhibits introduced during the trial of said cause.

Dated this 31st day of May, 1957.

/s/ CARL G. KOCH,
KARR, TUTTLE & CAMPBELL,
Attorneys for Northwest Airlines, Inc., Defendant-
Appellant.

WILLIAMS & KINNEAR,
JOHN W. RILEY,

/s/ By RONALD A. MURPHY,
Attorneys for Geraldine B. Gorter, Administratrix
of the Estate of John W. Waldrep, Deceased,
Plaintiff-Appellee.

[Endorsed]: Filed June 12, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Defendant hereby makes this statement of points on which it, as appellant, intends to rely on the appeal of this case:

1. That the trial court erred in making the following portion of Finding of Fact No. 2:

“That the decedent, John M. Waldrep, an American citizen died on the 19th day of January, 1952, in the crash of an airplane operated by defendant at a point in salt water more than a half mile out seaward from low water

mark and off shore of Sandspit, British Columbia, Dominion of Canada.”

That said Finding is unsupported by the evidence before the court. The court should have found from the evidence that the decedent, John M. Waldrep, was a passenger on the airplane operated by defendant and that said airplane crashed in salt water at a point landward from low water mark and in the jurisdiction of British Columbia, Dominion of Canada.

2. That the trial court erred in making Finding of Fact No. 8. That the trial court should have found from the evidence that the pertinent sections of the British Columbia Families' Compensation Act were pleaded and proved and that said Act was the only law affording a cause of action for wrongful death of an airplane passenger resulting from the crash of an airplane into the water in British Columbia, Canada; that said Act was applicable and in full force and effect at the time and place where decedent Waldrep died; that the one year limitation of action provided for in Section 5 of said Act is a bar to plaintiff's cause of action; that even if said crash occurred seaward of low water mark, there was no applicable law of British Columbia or Canada under which plaintiff's cause of action to recover damages for the wrongful death of the decedent Waldrep could have been maintained; that defendant has sustained by a preponderance of the evidence its 12th affirmative defense; that the wrongful death statute of the State of Washington

has no application and does not control or govern the rights of the parties in this cause.

3. That the trial court erred in making the following portion of Finding of Fact No. 9 which the evidence before the court does not support:

“9. That the defendant has failed to sustain by preponderance of evidence in this case, facts necessary to support the allegations of their other affirmative defenses as to Count I of the plaintiff’s complaint. But on the contrary, the court finds that:

“* * * * *

“e. That defendant failed to proved by the preponderance of the evidence any law other than the Wrongful Death Act of the State of Washington which would be applicable to this cause of action.”

Instead of said finding, the trial court should have found that defendant sustained by a preponderance of evidence facts necessary to support the allegations of its 12th affirmative defense based upon the one year statute of limitations contained in Section 5 of the British Columbia Families’ Compensation Act pleaded by defendant; that defendant pleaded and proved the pertinent provisions of the British Columbia Families’ Compensation Act and has proved that said Act is the only law applicable to the facts of this case.

4. That the trial court erred in making Finding of Fact No. 10 which the evidence before the court does not support. That the court should have found that the deceased Waldrep completed the tenth

grade in school only, was unskilled, and from age sixteen spent nearly all of his time in military service. That at the time of his death he was a buck sergeant, pay grade "E-4", in the United States Army. That it could be reasonable expected that the deceased Waldrep would support his dependents to the extent that his means permitted. That Judith Ann Waldrep is a normal five-year-old girl of average intelligence.

5. That the trial court erred in making Finding of Fact No. 12 which the evidence before the court does not support. That the sum of \$40,000.00 is excessive.

6. That the trial court erred in making Conclusion of Law No. 4 which the evidence and facts do not support. The trial court should have concluded that the Wrongful Death Act of the State of Washington was not applicable under the facts as found by the court or as claimed by the defendant. That thereunder plaintiff cannot maintain an action to recover damages for the death of Waldrep.

7. That the trial court erred in making Conclusion of Law No. 5 which the evidence and facts do not support. That the trial court should have concluded that plaintiff is not entitled to recover under the laws of the State of Washington.

8. That the trial court erred in making Conclusion of Law No. 6 which the evidence and facts do not support. That the trial court should have concluded that plaintiff was not entitled to judgment in any sum.

9. That the trial court erred in entering judg-

ment for plaintiff. That the trial court should have entered judgment dismissing plaintiff's complaint with prejudice and should have awarded defendant its taxable costs and disbursements incurred.

10. That the trial court erred in sustaining plaintiff's objection to the testimony of witness John Bird which defendant sought to introduce for the purpose of proving that there was no law applicable to the facts of this case, other than the British Columbia Families' Compensation Act, under which plaintiff could maintain a cause of action or recover for the wrongful death of decedent Waldrep.

11. That the trial court erred in permitted plaintiff to introduce over defendant's objection evidence that the accident did not happen in British Columbia, and in permitting plaintiff's witness J. R. Cunningham to answer, over defendant's objection, questions posed by plaintiff's counsel, the answers to which depended on whether the accident happened within or outside of British Columbia.

12. That the court erred in entering its order May 20, 1957, denying defendant's Motion for New Trial, Motion to Re-Open and Motion to Amend Defendant's Answer.

Dated this 29th day of May, 1957.

/s/ CARL G. KOCH,
KARR, TUTTLE & CAMPBELL,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 12, 1957.

[Letterhead of Karr, Tuttle & Campbell]

(Copy)

Williams & Kinnear
Attorneys at Law,
3314 White Building,
Seattle, Washington

May 23, 1957

Attention: Mr. Ronald A. Murphy

Re: Appeal of Gorter v. Northwest Airlines, Inc.

Gentlemen:

As we have previously advised you, the only issues of fact we intend to raise on appeal are those relating to where the accident occurred and the excessiveness of the damages awarded plaintiff. On that account, we deem it appropriate to proceed under Rule 75 of the Rules of Civil Procedure to designate only a portion of the records, proceedings and evidence to be contained in the record on appeal, and to accompany such designation with a concise statement of the points of reliance on appeal. Section e of Rule 75 states that all matters not essential to the decision of the questions presented by the appeal shall be omitted. With this caution in mind and as we have explained to you and Mr. Riley on two previous occasions, we have met with Mr. Cropp and Miss Stewart on two occasions to ferret out the testimony having a bearing upon the issues on appeal. We recognize that portions of the testimony of Messrs. Maynard, Matthews, Sanders, Cox and Leonard do have a bearing. We further intended to designate all of the testimony of Messrs. Kildahl, Bird and Cunningham.

We are now advised that Miss Stewart, who reported the proceedings in court from April 9 through April 17, plans to leave Seattle June 14 and take up residence in Panama commencing July 1, 1957. We were afraid that time would not permit her to designate the portions of the testimony of Messrs. Matthews, Cox, Sanders and Leonard in time to serve it upon you, allow you ten days to designate additional portions of the record, and have that transcribed prior to June 14. On that account, we now propose to furnish all of the testimony of Messrs. Maynard, Matthews, Sanders, Cox, Leonard, Kildahl, Cunningham and Bird, and at a subsequent time in accordance with Rule 18 of the Rules of the U. S. Circuit Court of Appeals for the Ninth Circuit, the portions of the testimony of these witnesses which are immaterial and irrelevant on the issues before the court on appeal can be excluded from the portion of the record to be printed.

We request that you enter into a stipulation with us by which it is mutually acknowledged that the testimony of the following witnesses are not material or relevant to the issues on appeal as specified in the concise statement of points upon which appellant intends to rely on appeal, a copy of which is attached and will be filed with the U. S. District Court for the Western District of Washington, Northern Division, if this stipulation is entered into. The witnesses whose testimony would be excluded under this stipulation are: Alfred T. Peterson, E. K. Pitcher, Alvin Opsahl, Dr. A. H. Seer-

ing, Dr. Alfred Sheridan, C. E. Smith, Robert M. Lewis, Frank Kavanaugh, Wilbur Hewitt, Lawrence Thompson, Gerald F. Whittle, and Gene R. Kingston, Dr. Paul Ruuska, and Earle Conwell (by deposition).

This stipulation is limited to the witnesses' testimony. Further stipulations will be proposed within the next few days relating to the elimination of immaterial and irrelevant exhibits and records contained in the original file in this case in the office of the Clerk of the District Court.

The procedure proposed in this letter is that suggested by the Ninth Circuit Court of Appeals in *Watson v. Button* (CCA 9 1956) 235 F. (2d) 235. Where the appellee is unwilling to stipulate to the elimination of immaterial and irrelevant portions of the record and thus forces appellant to bring the entire record to the appellate court, the court may tax the costs of such on appellee even though the decision is affirmed on appeal.

Very truly yours,

KARR, TUTTLE & CAMPBELL,

/s/ By CARL G. KOCH.

CGK:pj

Enc: 2cc Stipulation

2cc Statement of Points

[Endorsed]: Filed June 12, 1957.

[Letterhead of Williams & Kinnear]

Mr. Carl G. Koch

May 27, 1957

Karr, Tuttle and Campbell

1411 Fourth Avenue Building

Seattle 1, Washington

Re: Appeal of Gorter v. Northwest Airlines, Inc.

Gentlemen:

As we have previously advised you, it is agreeable with us that the testimony of Doctors A. H. Seering, Alfred Sheridan, Gene R. Kingston, Paul Ruuska and Earle Conwell do not involve matters essential to the discharge of the questions presented by defendant in its "Statement of Points on which Appellant Intends to Rely on Appeal" and may be omitted therein.

Very truly yours,

WILLIAMS & KINNEAR,
JOHN W. RILEY,

/s/ RONALD A. MURPHY.

RAM/c

cc. Mr. John W. Riley

[Endorsed]: Filed June 12, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
THE APPEAL

This matter having duly and regularly come on

for hearing before the undersigned Judge of the above-entitled Court upon the motion of defendant for an order extending the time for filing the record on appeal in the above-entitled matter and docketing the appeal, it appearing to the Court that said motion is timely made in accordance with Rule 73 (g), Federal Rules of Civil Procedure, and the Court being fully advised, now, therefore,

It is hereby ordered that the time for filing the record on appeal and docketing the appeal herein be and the same hereby is extended to and including August 19, 1957.

Done in Open Court this 12th day of June, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ COLEMAN P. HALL
Of Kaar, Tuttle & Campbell,
Attorneys for Defendant.

Approved by:

/s/ RONALD A. MURPHY
Of Williams & Kinnear and
John W. Riley,
Attorneys for Plaintiff.

[Endorsed]: Filed June 12, 1957.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMISSION OF
ORIGINAL EXHIBITS

This matter having duly and regularly come on

for hearing before the undersigned Judge of the above-entitled Court upon the application of defendant for an Order directing transmission of all original exhibits admitted into evidence in the above cause to the United States Court of Appeals for the Ninth Circuit as part of the record on appeal in said cause, and it appearing to the Court that defendant has filed its designation of contents of records on appeal designating for inclusion in said record all of said exhibits, now, therefore,

It Is Hereby Ordered that the Clerk of the above-entitled Court be, and he hereby is, directed to transmit to the United States Court of Appeals for the Ninth Circuit, as part of the record on appeal in the above-entitled cause, all of the original exhibits admitted in evidence in said cause.

Done in Open Court this 12th day of June, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ COLEMAN P. HALL
Of Karr, Tuttle & Campbell,
Attorneys for Defendant.

Approved:

/s/ RONALD A. MURPHY
Of Williams & Kinnear and
John W. Riley,
Attorneys for Plaintiff.

[Endorsed]: Filed June 12, 1957.

[Title of District Court and Cause.]

STIPULATION AS TO PORTION OF PROCEEDINGS AND EVIDENCE NOT MATERIAL TO ISSUES ON APPEAL

Attached is Statement of Points on Which Appellant Intends to Rely on Appeal, prepared pursuant to the provisions of Rule 75 of the Rules of Civil Procedure, which appellant will file in the above captioned cause in accordance with said Rule 75 provided the following stipulation is entered into by and between counsel for appellant and appellee:

It Is Hereby Stipulated that the evidence and testimony of the following witnesses are not material or relevant to the issues on appeal as specified in the concise statement of points upon which appellant intends to rely on appeal, and that said evidence and testimony shall not be designated by appellant or appellee to be included in the portions of the records, proceedings and evidence to be contained in the record on appeal: Alfred T. Peterson, E. K. Pitcher, Alvin Opsahl, Dr. A. H. Seering, Dr. Alfred Sheridan, C. E. Smith, Robert M. Lewis, Frank Kavanaugh, Wilbur Hewitt, Lawrence Thompson, Gerald F. Whittle, Gene R. Kingston, Dr. Paul Ruuska, and Earle Conwell.

It Is Further Stipulated that, except for the evidence and testimony of the witnesses specifically excluded by the foregoing paragraph, appellant shall designate all the rest and remainder of the reporter's transcript of the evidence or proceedings in the above captioned cause.

It is understood and agreed that, with the exception of the deposition of Earle Conwell which shall not be designated by appellant or appellee to be contained in the record on appeal, this stipulation relates only to the reporter's transcript of the evidence and proceedings in the above captioned cause, and this stipulation does not cover or relate to the portions of the record contained in the original file in this cause in the office of the Clerk of the above captioned Court, nor to the exhibits introduced during the trial of said cause.

Dated this day of May, 1957.

KARR, TUTTLE & CAMPBELL,
Attorneys for Northwest Airlines, Inc., Defendant-
Appellant.

.....
Attorneys for Geraldine B. Gorter, Administratrix
of the Estate of John W. Waldrep, Deceased,
Plaintiff-Appellee.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and

Rule 75(o) FRCP I am transmitting herewith the following original documents in the file dealing with the above action, including admitted exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Jan. 18, 1954.
2. Summons with Marshal's return thereon, filed Jan. 21, 1954.
7. Motion to Dismiss Complaint for Failure to State a Claim, filed Feb. 9-54.
9. Order Changing Venue (Certified copy), filed 4-22-54.
11. Appearance of Ryan, Askren & Mathewson for Plaintiff, filed 4-19-55.
13. Memorandum of Authorities in Opposition to Defendant's Motion to Dismiss, filed April 22, 1955.
14. Plaintiff's Memorandum Regards Motion to Dismiss Count Two for Lack of Jurisdiction Over the Subject Matter, filed Apr. 22, 1955.
18. Order Overruling Motion to Dismiss and Quash, filed May 23, 1955.
23. Answer of Defendant, filed Dec. 30, 1955.
24. Notice of Substitution of Attorneys, filed Apr. 18, 1956.
25. Withdrawal of Attorneys Tuttle & Luce, filed May 1, 1956.
26. Withdrawal of Attorneys Fowler, Leav, Hawes & Symington, filed 5-1-56.

28. Motion for Order for Production of Documents, filed Aug. 29, 1956.

29. Affidavit in Support of Plaintiff's Motion for Order for Discovery and Inspection of Documents Under Rule 34, filed Aug. 29, 1956.

32. Request for Admissions of Fact, filed by Plaintiff Aug. 31, 1956.

37. Answer to Plaintiff's Request for Admissions of Fact, filed 9-24-56.

38. Order on Plaintiff's Motion for Production of Documents, filed 9-25-56.

40. Order of Continuance and Consolidation, filed Oct. 4, 1956.

47. Notice of Appearance of Associate Counsel, filed Feb. 12, 1957, (Williams & Kinnear).

62. Motion Defendant for Leave to Amend Paragraph IX of Answer, filed 2-20-57, with supporting affidavit of Coleman P. Hall attached.

66. Ptff's Memo. Contra Motion of Deft. to Amend Answer, filed 2-25-57.

67. Affidavit of John W. Riley Contra Motion for Leave to Amend Answer, filed Feb. 25, 1957.

68. Amendment to Paragraph IX of Defendant's Answer, filed 2-25-57.

73. Motion for Leave to Amend Complaint, filed March 5, 1957.

74. Proposed Amendment of Plaintiff's Complaint, filed 3-5-57.

95. Stipulation re submission of certain documents in evidence, filed 3-18-57.

96. Pre-trial Order, filed Mar. 18, 1957.

99. Motion Defendant to Quash Subpoenas, filed Mar. 21, 1957.

102. Affidavit Contra Plaintiff's Motion to Quash Subpoenas and Motion to Strike Defendant's Answer, etc., filed Mar. 22, 1957.

107. Trial Amendment of Complaint, filed Mar. 26, 1957.

110a. Additional Affidavit in Support of Plaintiff's Motion to Strike Defendant's Answer, Impose Costs, etc., filed Apr. 11, 1957.

112. Memorandum of Authorities on Willful Misconduct, filed 4-17-57.

113. Memorandum of Law Relative to Damages, filed Apr. 17, 1957.

114. Memorandum of Authorities on Pleading, filed Apr. 17, 1957.

115. Memorandum on Damages Sustained and Awardable to the Estate of Sgt. J. M. Waldrep, filed April 17, 1957.

116. Plaintiff's Memorandum on Final Argument, filed Apr. 17, 1957.

119. Memorandum of Authorities on Presumption of Foreign Law, filed 4-17-57.

120. Motion deft. to Amend Defendant's Answer, Motion to Reopen for Further Evidence, filed May 14, 1957.

121. Notice of Presentation, filed May 14, 1957. Amendment to Answer and Affirmative Defense, lodged May 14, 1957.

122. Court Reporter's Transcript of Oral Decision of Court, filed 5-15-57.

123. Findings of Fact and Conclusions of Law, filed May 15, 1957.

124. Judgment filed May 15, 1957.

125. Findings of Fact and Conclusions of Law Proposed by Defendant, and refused by the Court, filed May 15, 1957.

126. Cost Bill, filed May 16, 1957, as taxed.

127. Motion for New Trial, Motion to Re-open for Further Evidence; Motion to Amend Defendant's Answer, filed May 20, 1957.

128. Order Denying Defendant's Motion for New Trial, etc., filed 5-20-57.

129. Notice of Appeal, filed May 22, 1957.

130. Supersedeas and Cost Bond on Appeal, filed May 22, 1957.

131. Amended Notice of Appeal, filed May 31, 1957.

132. Stipulation as to Portion of Proceedings and Evidence Not Material to Issues on Appeal, filed June 12, 1957.

133. Statement of Points on Which Appellant Intends to Rely, filed June 12, 1957.

134. Appellant's Designation of Portions of Record, Proceedings and Evidence, filed June 12, 1957.

135. Letter, Karr, Tuttle & Campbell dated 5-23-57, to Williams & Kinnear, filed June 12, 1957.

136. Letter, Williams & Kinnear and John W. Riley to Karr, Tuttle and Campbell, dated May 27, 1957, and filed June 12, 1957.

138. Order Extending Time for Docketing Record on Appeal to August 19, 1957, filed June 12, 1957.

140. Order Directing Transmission of Original Exhibits, filed 6-12-57.

141. Appellee's Designation of Additional Portions of Record, filed 6-21-57.

142. Stipulation as to Portion of Proceedings and Evidence Not Material to Issues on Appeal, filed July 16, 1957.

143. Appellant's Additional Designation of Portions of Record, Proceedings and Evidence, filed July 16, 1957.

144-147. Court Reporter's Transcript of testimony and proceedings (4 volumes), filed August 13, 1957.

Plaintiff's Exhibits numbered 6 to 9 incl.; 12 to 18 incl.; 20 to 25 incl.; 27, 29, 30, 31, 33, 35, 36, 38, and

Defendant's Exhibits numbered A-3, A-5, A-15 to A-26 incl.; A-29 to A-35 incl.; A-41, A-42 and A-43.

I *further that* the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit:

Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for appellant.

Witness my hand and official seal at Seattle this 13th day of August, 1957.

[Seal] MILLARD P. THOMAS,

Clerk,

/s/ By TRUMAN EGGER,

Chief Deputy.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to the record on appeal in the above cause, the following additional papers or documents dealing with the action, to-wit:

76. Deposition of Lee Roy Waldrep on behalf of plaintiff, filed March 6, 1957.

83a. Deposition of Donald E. Baker on behalf of plaintiff, Volume 1, filed March 11, 1957.

83b. Deposition of Donald E. Baker on behalf of plaintiff, Volume 2, filed March 11, 1957.

84. Deposition of H. B. Maynard on behalf of defendant, filed March 11, 1957.

89. Deposition of Richard Pontius Fields on behalf of defendant, filed March 12, 1957.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 19th day of August, 1957.

[Seal] MILLARD P. THOMAS,
 Clerk,

/s/ By TRUMAN EGGER,
 Chief Deputy.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 3695

GERALDINE B. GORTER, Administratrix of the
Estate of John M. Waldrep, Deceased,
Plaintiff,

vs.

NORTHWEST ORIENT AIRLINES, a Minne-
sota corporation, Defendant.

No. 3872

H. D. MAYNARD, Plaintiff,

vs.

NORTHWEST ORIENT AIRLINES, a Minne-
sota corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that the above-entitled and numbered causes were consolidated for trial and heard before the Honorable John C. Bowen, one of the Judges of the above-entitled Court, beginning Monday, March 25, 1957, at 2:15 o'clock p.m.

The plaintiffs were represented by Messrs. John W. Riley, Ronald A. Murphy and Morell E. Sharp, Attorneys at Law. [1]*

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

The defendant was represented by Messrs. Payne Karr and Carl G. Koch, of Messrs. Karr, Tuttle & Campbell, Attorneys at Law.

(Whereupon, the following proceedings were had and done, to-wit:)

The Court: Are Counsel and the parties ready to proceed in the case of Geraldine B. Gorter, Administratrix of the estate of John M. Waldrep, deceased, against Northwest Orient Airlines, a Minnesota corporation, No. 3695, together with the case of H. D. Maynard against the same defendant, being numbered 3872, consolidated for trial?

Mr. Riley: The plaintiffs Gorter and Maynard are ready to proceed, your Honor.

Mr. Koch: Your Honor, the defendant is ready to proceed, but there is a preliminary motion to be passed upon.

The Court: Very well. What is the motion?

Mr. Koch: It is a motion to quash the subpoenas duces tecum served upon certain individuals in the employ of defendant and possibly unto the defendant, too.

(The Court heard oral argument by [2] Mr. Koch and Mr. Riley.)

The Court: Now I want to proceed with this trial. This matter is continued until tomorrow morning at the beginning of the trial session without prejudice to the present position of each party to the matter.

Now I wish to proceed with the matter of evidence or whatever it is that is a part of the plaintiffs' case in chief.

Mr. Riley: Very well. Mr. Donald Maynard, come forward, please.

The Court: Will that gentleman come forward and be sworn. And when you have in mind calling a witness other than your own, will you let me know positively what your intentions are?

Mr. Riley: Yes, your Honor.

HUFFORD DONALD MAYNARD

one of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riley): Mr. Maynard, would you state your full name for the record, please?

A. Hufford Donald Maynard.

Q. Where do you reside, Mr. Maynard?

A. At the present time 4326 Sharon Avenue, [3] Detroit, Michigan.

Q. How long have you resided there, Mr. Maynard?

A. Off and on approximately three years.

Q. What is your——

The Court: Now I will have to ask you to repeat. May I have your name, please?

A. Hufford Donald Maynard.

The Court: How do you spell the first name?

A. H-u-f-f-o-r-d.

The Court: And the second word is Donald?

A. Yes, sir.

The Court: And the last word is what?

A. Maynard, M-a-y-n-a-r-d.

(Testimony of Hufford Donald Maynard.)

The Court: You may proceed.

Q. (By Mr. Riley): You are one of the plaintiffs in this proceeding before this Court, is that right, Mr. Maynard? A. Yes, sir, I am.

Q. What is your employment? In what occupation are you engaged at the present time?

A. I am a clerk with the Ford Motor Company.

Q. How long have you been so employed?

A. I have about four years' seniority with the company.

The Court: And where is your present home?

A. Detroit, Michigan, sir. [4]

The Court: You may proceed.

Q. (By Mr. Riley): Where did you reside prior to the time you arrived in Detroit, Michigan?

A. Spruce Pine, Alabama.

Q. How long did you live in Spruce Pine prior to the time you arrived in Detroit, Michigan?

A. Well, I was born there, and I left there when I was about two years old. I moved to Sullivan's Island, South Carolina. I lived there until about 1941, then I moved back to Alabama, and I joined the service in 1945.

I got out of the Navy in 1947. I went to a school, Birmingham Business College in Birmingham, Alabama. I went there until 1949, then I joined the Air Force, and I stayed in the Air Force in the States for about a year and then I went to Japan. I got to Japan August the 11th, 1950, and I was there up until 1952 when I left for the United States on emergency leave.

(Testimony of Hufford Donald Maynard.)

Q. What was the date you left Japan, do you recall? A. January the 17th, 1952.

Q. How did you leave Japan?

A. By Northwest airplane from Haneda Airport in Tokyo.

Q. And would you describe the route that this flight took? What was the first stop of this aircraft?

A. The first stop that I remember of was at an Air Force base some place in Alaska. [5]

Q. When you boarded this flight were you given any ticket or did you have an type of a ticket that you had received from Northwest Airlines?

A. No, sir. They kept us at the airport until the airplane was ready to load the passengers and they called us out by name, seniority by rank, to board the airplane, and you would get on the airplane and set wherever there was a seat available for you. There was no tickets involved.

Q. What was the first stop of the aircraft again, please?

A. It was Shemya, Alaska, I believe is the correct name for it.

Q. How long did you remain——

The Court: Will you spell it for the record? The reporter I am sure would appreciate it.

Mr. Riley: For the record it's S-h-e-m-y-a, Shemya.

Q. (By Mr. Riley): How long did the ship remain in Shemya?

A. It was approximately four hours.

Q. Did anything unusual occur at Shemya?

(Testimony of Hufford Donald Maynard.)

A. Yes, in a way. They repaired the airplane to some extent, I don't know exactly what it was, and they refueled the airplane and got back on it.

Q. Did the passengers disembark at Shemya?

A. Yes. It was I think an Air Force base there. We got [6] off and had a meal and waited around till we could board it again.

Q. Were there any passenger changes that you were aware of effected at Shemya?

A. No, sir, there was no passenger changes that I know of.

Q. What was the next stop?

A. The next stop was Anchorage, Alaska.

Q. How long did you remain there?

A. About eight hours, I guess.

Q. Did anything unusual occur there?

A. Not that I know of. It's a Customs stop for us. We had——

Q. Were there any passenger changes that you know of effected there?

A. There was no passenger changes. It was to check to see if you brought any illegal merchandise from the Far West.

The Court: Then after Shemya, did you ask him the next stop after Shemya?

Mr. Riley: Yes, Your Honor.

The Court: And that was what, did you say?

A. Anchorage, Alaska, Your Honor.

The Court: Anchorage, Alaska. How long did you stay at Anchorage?

A. About eight hours, sir. [7]

(Testimony of Hufford Donald Maynard.)

The Court: You may proceed.

Q. (By Mr. Riley): At any time during the flight between Japan and Anchorage was there any instructions given you in the use of life jackets or survival equipment?

A. No, sir, there wasn't.

Q. How many flights, by the way, Mr. Maynard, had you had at that time in other types of aircraft?

A. That was the third time, the third time I was in an airplane.

Q. What type of flights were the others?

A. The first one was a small seaplane, I believe it was about a six passenger airplane, and the second one was a military C-45, a small airplane, two-engine type.

Q. Are you familiar with the literature that are installed in commercial aircraft?

A. Yes, I have seen 'em.

Q. Now, at any time at this point or on your flight between Japan and Anchorage did you have such literature available to you in this aircraft?

A. I did not see any on this aircraft.

Q. Did you look for it?

A. I looked in the back of the seat. In front of you there's a pocket there for the containers when you get sick and to hold magazines and pamphlets and so forth, and there was nothing in this one except some of those [8] containers when you get sick and a picture postcard of some type of aircraft. I forget which one it was now.

(Testimony of Hufford Donald Maynard.)

Q. Do you recall the date the aircraft left Anchorage?

A. That was the 19th of January.

Q. To where was the plane destined as it left Anchorage?

A. It was to go to McChord Field, McChord Air Force base.

Q. So far as you know were all the passengers aboard the aircraft the same as the passengers that embarked in Japan?

A. Yes, sir, they were.

Mr. Koch: I object to that, your Honor. It's a leading question.

The Court: That objection is sustained.

Try to avoid leading questions.

Q. (By Mr. Riley): Do you know whether or not there were any passenger changes effected at Anchorage as the aircraft departed?

A. No, sir, to my knowledge there were no passenger changes at all any place on the trip.

The Court: Passenger changes?

A. Yes, sir, passenger changes.

The Court: What do you mean by that? With reference to adding to or decreasing the number of passengers?

A. Well, I mean, sir, that there were no [9] scheduled places for any passengers to get off any place. They were all supposed to have been on the aircraft from Tokyo to McChord Air Force Base.

The Court: How many did get on, if any, and

(Testimony of Hufford Donald Maynard.)

how many got off, if any, at any of those points mentioned by Counsel's last question to you?

A. There were forty passengers got on at Tokyo and no passengers got on or off at the two stops.

The Court: You mean no additional passengers?

A. Yes, sir.

The Court: Or other passengers.

A. Yes, sir.

Q. (By Mr. Riley): After you left Anchorage I will inquire whether or not you were instructed in the use of life jackets or emergency landings or the use of emergency equipment in the aircraft?

A. No, sir, we wasn't.

Q. How long were you in the aircraft or how long was the aircraft airborne before it landed next?

A. It was about four hours until they tried to—made an attempt to land at Sandspit, approximately.

Q. During that four hours between Anchorage and Sandspit were you aware of or did you find any literature of any kind or were there any other discussions or were [10] you apprised of any emergency situation? A. No, sir, I wasn't.

Q. Did anyone tell you whether or not an engine on the aircraft had been feathered?

A. No, sir.

Mr. Koch: That's leading, your Honor. That's a leading question. He has already answered it by the preceding question.

The Court: Do you admit that you have?

(Testimony of Hufford Donald Maynard.)

Mr. Riley: I'm sorry. It was a leading question, your Honor.

The Court: Very well. The Court sustains the objection.

Q. (By Mr. Riley): Would you state your position in the cabin, Mr. Maynard?

A. I was on the right-hand side just back of the right wing on the seat next to the wall.

Q. How did you know or where did you know that you were going to land at Sandspit?

A. We didn't know we was going to land until the flasher lights up in front of the cabin told you no smoking and fasten your seat belts, that we were going to make a landing.

Q. Did any member of the crew come back and talk to you in any way? [11]

A. The stewardess was in the cabin at the particular time and she went by to see that everybody had their life belts fastened and that there was no one smoking.

Q. What if any other information was related to the passengers in the cabin?

A. That was it. There was no more.

Q. Did you know where Sandspit was?

A. No, sir, I didn't.

Q. Did you know whether the aircraft was over the water or over land?

A. I didn't know that it was over either one, but I surmised that it was probably over water.

Q. In the flight between Anchorage and Sandspit can you relate or did you observe the weather?

(Testimony of Hufford Donald Maynard.)

A. Occasionally I looked out of the window and you could see a cloud once in a while. It was dark, though, you couldn't see too much of anything.

Q. Were the windows clear or frosted?

A. At times they would have a little frost on them, but usually it was pretty clear.

Q. Can you say whether or not the air was rough or smooth or otherwise?

A. I would say it was fairly smooth.

Q. When did you first—after you left Anchorage when did you first see the ground? [12]

A. I actually didn't see the ground. The only thing that I seen were a couple of the runway lights; when the airplane first touched on the runway I seen one or two of those, and that was it. I didn't see any others.

Q. Would you describe as you recall it the approach to the field in the aircraft?

A. It was into the left, he banked to the left into the position of the field, and you couldn't see—I couldn't see nothing out the window except just a little patch of clouds once in a while, and stars, you could see stars a little bit, and that was all you could see.

Q. Could you observe from your position in the cabin at what point the aircraft touched down on the runway?

A. No, I don't think I could.

Q. Was the aircraft on the ground for any period of time? Or how long was the aircraft on the ground? Let me phrase it that way.

(Testimony of Hufford Donald Maynard.)

A. I couldn't say exactly how many minutes or seconds. I know that it was a very short time, though.

The Court: What was on the ground a short time, if it was a very short time, if you know?

A. Sir, the length of time it was actually on the ground.

The Court: The plane? [13]

A. Yes, sir.

Q. (By Mr. Riley): When did you know that you became airborne again?

Mr. Koch: Your Honor,—

The Court: That objection is sustained. He has not said that he did know that they became airborne again.

Mr. Riley: That's right.

Mr. Koch: Your Honor, I object to any further questions in this series because this raises the point that was discussed when these attempted amendments to the complaint were made, your Honor.

The Court: I wish to proceed. We will see later about the amendments. This may be stricken. The reporter will note in the record that this be subject to later objection as not being within the issues.

Mr. Koch: Your Honor, I wonder if I may ask the Court's indulgence with respect to this particular witness from now on that Mr. Karr conduct any objections and also his examination.

The Court: Each examining Counsel has to conduct his own questioning and his own—

(Testimony of Hufford Donald Maynard.)

Mr. Koch: I wish to withdraw with respect to this witness because Mr. Karr is familiar with [14] having taken his deposition and I was only attending to it in Mr. Karr's absence.

The Court: Very well. Hereafter will both Counsel who expect to participate in the trial be here all the time, please, if they wish to? I would not want to duplicate this situation again, but that may be done in view of that circumstance. But even a similar circumstance in the future during this trial would not justify the changing of attorneys in the midst of the interrogation. I ask you to determine that before you start, will you please?

Mr. Koch: Yes, your Honor.

The Court: You may proceed, Mr. Karr, if you wish to, and this question may be asked under conditions stated by the Court.

Q. (By Mr. Riley): Would you state what if anything happened after the aircraft touched down on the runway?

A. I don't know exactly if anything happened. I know you could feel the airplane being given more power to take off from the ground again, and all of a sudden it hit and the lights were out, and then for the length of time it took to unfasten my safety belt and to get to the emergency door, which was by the seat in front of me, there was water inside of the airplane, and that was the first time that I actually knew that we was [15] in the water.

Q. Were there any lights in the cabin after this impact? A. No, sir, there was not.

(Testimony of Hufford Donald Maynard.)

Q. Would you state again how you got out of the cabin, if you got out?

A. Through the emergency door over the wing on the right side.

Q. Did that take you out onto the wing?

A. It's approximately about the middle of the wing.

Q. And which wing of the aircraft again?

A. That's the right-hand wing.

Q. Do you recall how many people evacuated the aircraft by that route?

A. I would say about eight people got out on that wing.

Q. Did you have a life jacket?

A. No, sir, I didn't have one.

Q. Did you ever see one?

A. I seen one that a survivor had on. I seen it at a distance.

Q. Did you see any in the aircraft?

A. No, sir, I didn't see one in the aircraft.

Q. Were any rafts—did you see any rafts in the aircraft?

A. No, sir, I did not see a raft inside.

Q. Were any rafts taken from the aircraft?

A. There was supposed to have been an attempt to get one [16] out, but there were never one taken out of it.

Q. Do you know what happened in that respect?

A. It was supposed to have blown—

Mr. Karr: Just a moment, please, Mr. Maynard.

The Court: Leave out the "supposed." Do not

(Testimony of Hufford Donald Maynard.)

say that. You can say what you observed, that is all.

A. No, sir, I don't know what happened to it.

Q. (By Mr. Riley): What could you see from your position outside the airplane, if anything?

A. Very little.

Q. What did you see?

A. I seen the people within four or five foot from me, and that's about all you could see distinctly and clearly to know what you were seeing.

Q. Did you see any lights anywhere else?

A. I seen one flashlight. I supposed it was a flashlight at the time.

Q. Could you see the shore?

A. You could see automobile headlights and lights in houses, but that was it, you couldn't actually see the shore.

Q. You described automobile headlights. Now, how many of those were there? A great number, or——

A. No, just a few. Maybe two or three.

Q. Did you remain on the wing of the aircraft, or how long did you remain on the wing of the aircraft?

A. I was on the wing of the aircraft from the time I got outside the airplane until the time we was rescued.

Q. How many people were on that wing of the aircraft with you?

A. At the time we was rescued there were seven, seven people on that wing. Prior to that they would fall off the wing and not come back, and there

(Testimony of Hufford Donald Maynard.)

would be other people coming from other parts of the airplane, too, to that wing, because that wing at the time, the tip of it was the highest part out of the water, and the main object of the people was to get out of the water.

Q. Do you know whether or not there were people on other portions of the aircraft?

A. Actually you couldn't see people, but you could hear 'em yelling for help. Whether they was actually in the water and trying to get back on the airplane or just hollering for help in general.

Q. Do you know whether or not anyone was injured inside the cabin of the airplane at the point of impact? A. No, sir, I couldn't say.

Q. When you evacuated the cabin did you see any of the crew of the aircraft? [18]

A. No, sir, I didn't see any of the crew.

Q. Did you receive any instructions from anyone when you evacuated the aircraft?

A. The only instructions that I received getting out was somebody said, "Don't strike a match inside the aircraft," and that was all the instructions that were handed out.

Q. Now would you describe what happened to you from the point that you were able to evacuate to the wing, how long you were able to stay there?

A. Pardon me? What was that question?

Q. I'll rephrase the question. Would you describe what happened to you, if anything, while you remained on the wingtip with your other survivors

(Testimony of Hufford Donald Maynard.)

A. Well, when I first went out on the wing the object I had in mind was to swim to shore, but the water was so cold and numbed that I knew I couldn't do any good at it, so I decided I would take my shoes off so I could get better footing on the wing, and I—the water was cold and it would make your hands numb, and I had to ease my finger up under the shoe string to break it to pull off my shoes, and I took off my coat and tie and my shirt. I had on a sweatshirt on under the shirt. And the tide was coming in. It had pretty good sized waves; not real big, but it was enough to knock you [19] down. The wing was slippery from oil, I suppose it was oil or gas or something, and it would knock you off and you'd reach up to grab somebody or hold to the wing or any way that you could get back on, and usually there was somebody there to pull you back up on it, and there would be people swimming around, yelling, so actually you couldn't keep track of what actually was going on all the time. But we stayed there, and pretty soon there was seven left. Everybody would shout and scream and whistle, and pretty soon you could see in the distance a little red light, and there was a boat coming after us. It had two men. It was a two-man fishing boat with a little trolling motor on it, and they asked us, they said, "Is there anybody else there?" We said, "We don't know." So he circled the aircraft and come back and he said, "The only thing I can do is take two of you at a time." He says, "This boat is a two-man boat

(Testimony of Hufford Donald Maynard.)
and there's already two people in it." He says, "I'll take one or two of you at a time," and he says, "Unless you want to hold onto the boat and take a chance of getting towed in." So we elected to do that, and we were towed in to shore.

The Court: How many of you held onto the boat in some manner while you were in the water being towed by the boat? [20]

A. We put our arms over the side of the boat and held on that way. There was two of 'em in the back and the rest along the side. Now, one of the men lost his grip and the man that was operating the motor in the back or one of the other survivors grabbed him and put him in the boat, so that left six on the outside.

The Court: You mean all seven of those people who were on that wing tried to be towed in at one and the same operation of the boat, of that small boat?

A. Yes, sir, they were drug in that way.

The Court: You may proceed.

Q. (By Mr. Riley): At the time this boat came out to tow you in how long had you been on the wing of the aircraft?

A. About an hour and a half.

Q. How long did it take the boat to take you in to shore?

A. About fifteen minutes, ten or fifteen minutes.

Q. Can you say what happened to the people on the other parts of the aircraft?

A. Actually I don't know exactly what hap-

(Testimony of Hufford Donald Maynard.)

pened to 'em, but I know the water was cold and it would make you want to give up awful easy.

Mr. Karr: Just a moment. May it please [21] your Honor, it seems to me that's getting speculative.

The Court: The objection is overruled. That answer may stand.

Q. (By Mr. Riley): Why did the seven of you on the wing decide not to have the boat take you in two at a time?

Mr. Karr: That is objected to as immaterial, your Honor.

The Court: That objection is sustained. They did for good or bad reasons.

Mr. Riley: My intention there was only to show, your Honor, that they figured it was too cold, that they couldn't have made another round trip. That seemed to indicate the temperature of the water and the conditions under which——

The Court: He has already done so.

Q. (By Mr. Riley): What happened to you after you reached the beach then, Mr. Maynard?

A. When we reached the beach there were some people there. I don't know how many there were. I know definitely there was a car and a pickup truck there, and the Canadians there walked down to the edge of the water and picked us up, those that couldn't walk, and put us in trucks and a car.

Q. Where did the boat land, do you know, on the beach or a dock? [22]

A. It was a beach. There was a beach with logs

(Testimony of Hufford Donald Maynard.)

and driftwood and stuff on the beach. They put us in a pickup truck and a car and put blankets on us and took us to a big house. I don't remember what it was, but I think it belonged to the Canadian Pacific Airlines. But they took us into this house and stripped us, put us around a big stove and put blankets on us, gave us hot coffee and kind of rubbed us a little bit and put us in bed with blankets, quite a few blankets, hot water bottles, heating pads, and what they had.

Q. Were you all in one house?

A. Yes, sir, we were.

Q. How long did you remain there?

A. Until the following afternoon.

Q. By the way, were you able to walk to the truck or from the truck to the house?

A. No. I was half way carried. There was two people, one on each side of me, and I hobbled along that way.

Q. Did you receive medical treatment while there?

A. Yes, sir. There was a Canadian doctor that flew in the next—that morning about ten o'clock, and he gave us shots of penicillin and pills of some kind, and left.

Q. What happened to you then?

A. We stayed there that afternoon and then we were flown [23] to McChord Field, Air Force Base, and we went to the Air Force hospital there.

Q. What was your condition when you arrived at the hospital at McChord Air Force base?

(Testimony of Hufford Donald Maynard.)

A. We were still cold and shook up and our feet were real swollen up, cold, and couldn't walk too good, and so they immediately put us to bed and fed us and checked us over for broken bones and bad cuts. They gave us penicillin and sleeping pills, and I went to sleep.

Q. You described cuts. Where were these or what were these?

A. No, I say they looked you over for cuts and broken bones.

Q. Oh, I see. How long were you in the hospital at McChord Air Force base?

A. We got in that night and the next afternoon we left McChord.

Q. Where did you go? A. I went home.

Q. What was the condition of your feet then?

A. They were swollen. I couldn't get my everyday service shoes on, so the Air Force gave myself and Lieutenant Baker, and there was a couple more but I forget who they were now, these big Arctic boots to wear because [24] we couldn't wear normal shoes.

Q. How long did you wear those?

A. About two days.

Q. Were you able to wear shoes after that?

A. You could wear shoes but they would be real tight, they wasn't comfortable, but too many people would laugh at you with those big white shoes on, so you figured you'd give up a little discomfort.

The Court: I think we will stop here. Court is adjourned until tomorrow morning at ten o'clock.

(Thereupon, at 4:35 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Tuesday, March 26, 1957.)

Tuesday, March 26, 1957.

10:00 o'clock a.m.

(All parties present as before.)

The Court: Counsel may proceed with the plaintiff's case in chief. If you have some questions you think you can settle about the unfinished matter from yesterday, I will hear you.

(The Court heard oral argument by Mr. Koch and Mr. Riley.) [25]

The Court: In view of what defendant's Counsel has said the Court rules as follows:

That the subpoenas against the individuals served in some territorial jurisdiction other than that within the limits of this court, the Western District of Washington, are ineffective and may further be considered null.

The subpoenas of the corporation to produce certain documents here have been effectively responded to by the voluntary production by defendant corporation of the records which have been spoken of heretofore and a moment ago also as records now on Counsel table.

Therefore, as to records only of the defendant, the Court rules that they are here and that the motion to quash the subpoenas against the corporation is denied, but the Court rules that that subpoena of records has been accomplished by means of a production by the defendant corporation of

the pertinent records and placing those records on Counsel table in the presence of the Court during this trial. Those records will be kept on Counsel table subject to the Court's further order. They are not at this moment admitted in evidence.

You may proceed.

Mr. Riley: Call Mr. Maynard to return to [26] the stand.

HUFFORD DONALD MAYNARD

(resumed the stand.)

(Direct Examination—(Continued))

Q. (By Mr. Riley): Mr. Maynard, yesterday we were discussing your evacuation from Sandspit, British Columbia, and before proceeding I wanted to ask you just a couple more questions relating to the people that were helping you in the crash there. How many people were there available and helping you at the most at any one time?

A. The most people that I seen at one time was six people.

Q. Who were those people?

A. That was the two men that rescued us in the boat and the elderly woman that was a cook for this house where we were staying, another man, a woman and a young boy.

Q. How many people were on the beach to assist you into the house after you were rescued?

A. I remember four.

Q. Now, these vehicles that you described as having picked you up, what were they again?

(Testimony of Hufford Donald Maynard.)

A. One was a pickup truck with a canopy like over the back, and a private automobile.

Q. Do you know whether or not these were privately owned [27] automobiles or were part of the field equipment?

A. They were privately owned vehicles.

Q. Do you know whether or not the boat which was used as a part of your rescue was a part of the field equipment?

A. That boat was a—belonged to one of the men that came to rescue us. They told us when they took us to the house that——

Mr. Karr: Just a moment please, Mr. Maynard.

The Court: You cannot say what they told you. That comes under what they call hearsay, which is not permissible over objection under the circumstances usually.

Mr. Riley: If your Honor please, if I might inquire, I would like to state that I believe that portions of this testimony would come within the res gestae portion of the exception to the hearsay rule, if I might inquire.

The Court: You may make that inquiry.

Q. (By Mr. Riley): When did you hear these conversations to which you were just now referring, Mr. Maynard?

A. That was when we were in the house and they was warming us up. The men was telling us that they were——

(Testimony of Hufford Donald Maynard.)

Mr. Karr: Just a moment, please, Mr. Maynard. I object, your Honor. [28]

The Court: You cannot say what he said. The time——

Q. (By Mr. Riley): How long after the crash was this, Mr. Maynard?

A. About an hour and forty-five minutes.

The Court: Where did it occur? Where, at what place did this occur?

A. The conversation, sir, would take place at the house where they had us to warm us up at.

The Court: That was after the small boat came to get you and took you to some place of refuge?

A. Yes, sir.

The Court: The objection is sustained.

Q. (By Mr. Riley): Was anything said at the scene of the crash by these men to you?

The Court: You would have to establish when, if there is objection to it.

Mr. Riley: Well, I'll only ask him yes or no, as to whether anything was said there, your Honor, and then I'll ask him when.

The Court: You may do that.

Q. (By Mr. Riley): Was anything said by these men at the scene of the accident?

A. One of the men in the boat——

The Court: Answer yes or no. [29]

Q. (By Mr. Riley): Just yes or no.

A. Yes.

(Testimony of Hufford Donald Maynard.)

The Court: Who were the men that made the statements?

A. I don't know them personally, sir.

The Court: Do you know for whom they were acting, if anyone? A. They weren't—

The Court: Just bystanders?

A. Yes, sir.

Q. (By Mr. Riley): Say again who these men were in the boat.

A. One of the men was a radio operator at the airstrip and the other man was an individual, a civilian, no connection with the airstrip.

Q. And did you state that there were conversations at the time you were picked off of the aircraft? A. Yes.

Q. Now, how long after the crash was that?

A. A hour and a half, thereabouts.

Mr. Riley: Then, Your Honor, I request permission to inquire what was said that would lead him to believe that this equipment was not field equipment, because it's an hour and a half within the accident and I believe it's within the *res gestae* exception. [30]

Mr. Karr: Your Honor, I don't quite see how the *res gestae* exception would apply.

The Court: The Court will have to sustain the objection.

Mr. Riley: Very well, Your Honor.

Q. (By Mr. Riley): Before proceeding then, Mr. Maynard, would you state once again how long

(Testimony of Hufford Donald Maynard.)

it took you to evacuate the aircraft from the point of impact until you got out of the aircraft?

A. I don't know exactly. About two minutes.

Q. How much water was in the aircraft at the time you left it?

A. Approximately ankle deep.

Q. How long did it take the aircraft to submerge?

Mr. Karr: Objected to. It has never been testified that the aircraft submerged. In fact, it didn't.

The Court: You will have to establish the fact concerning submersion before the question——

Mr. Riley: I'll withdraw the question.

Q. (By Mr. Riley): Did the aircraft sink, Mr. Maynard? A. The aircraft——

The Court: Answer yes or no.

A. Yes.

Q. (By Mr. Riley): How long did it take the cabin of the [31] aircraft to become submerged?

The Court: You know, one way of doing that normally would be to say, "State what parts you observed submerged meaning parts of the airplane." You have not really laid the foundation.

Mr. Riley: Very well, Your Honor. I'll withdraw the last question.

Q. (By Mr. Riley): Did the aircraft fuselage or cabin submerge? You can answer that yes or no.

A. Yes.

Q. And can you state how long it took it approximately to submerge?

(Testimony of Hufford Donald Maynard.)

The Court: You see, Mr. Riley, that type or form of question is liable to produce an irresponsive answer. It would be proper to ask him the question for the information you wish if anything of that sort happened based on that condition in your question.

Mr. Riley: Yes, Your Honor. I'm skipping here. I appreciate the Court's comment. Is that last question proper?

The Court: No, I do not think so. Change it.

Q. (By Mr. Riley): Can you state then, Mr. Maynard, what portions of the aircraft did sink or submerge? A. Yes, I can. [32]

Q. Well, then would you state what portions did submerge?

A. The airplane except for the right tip of the wing up to and including the tops of the windows was submerged under water, and the tide kept coming in and eventually all of it was submerged except for the extreme tip of the right wing and the vertical stabilizer.

Q. All right. You have testified that before the tide came in that the water reached the window level of the aircraft, and I will ask you if you know how long did it take the water to reach the window level of the cabin?

A. I don't know exactly in the matter of minutes, but to the best of my knowledge I would say three or four minutes.

Q. Would you tell us what you know about the

(Testimony of Hufford Donald Maynard.)

temperature of the water after you evacuated the aircraft?

A. The water would numb you almost instantly. When you were standing on the wing your feet felt like they wasn't there, like you were standing on your ankles or nubs. You didn't have any footing. And the shore line when we were on the—got to the beach, there was ice, the salt water had frozen. There was ice there, and it was cold enough to numb you and you didn't have any feeling there.

Q. Did you have any other injuries as a result of or which [33] were inflicted in the crash or after the crash?

A. I don't actually know whether it was in the crash or not, but when we got to the house they found that I had a small scratch on the side of my head and a bruise on my leg.

Q. I'll ask you once again, Mr. Maynard, whether or not you had any information as to why you were landing at Sandspit, British Columbia?

A. No, I didn't.

Q. Were you told by anyone at any time that there was any difficulty at all with the airplane?

A. No, sir, I wasn't.

Q. When did you find out, if you did, what the reason for the landing was?

A. I didn't find out that there was anything wrong with the aircraft until the Civil Aeronautics Administration were questioning us at the house.

Q. Now, you stated you were evacuated to Mc-

(Testimony of Hufford Donald Maynard.)

Q. (By Mr. Riley): How long did this condition persist?

A. The swelling stayed approximately two weeks, but even two or three weeks after that the pain would still be in the feet and the discoloration there.

Q. Now would you describe the pain that you experienced from this condition during the first two weeks?

A. It was an aching sensation and the feet were warming up and it had a burning sensation to it.

Q. Have you had continuing difficulty from your feet or did it continue from that time on?

A. No, it didn't continue from that time on. It never completely cured, but it didn't bother me afterward, after about two months after that, until I started walking around a lot, and then they started bothering me again, especially my legs.

Q. All right. You say it bothered you a lot. Would you describe what your trouble was?

A. It was an ache and a tightness to my legs.

Q. Well, is this a pain or just a feeling? What is it?

A. It's a pain.

Q. How do you obtain relief or how did you obtain relief from it?

A. By laying down, taking a hot bath, soaking the legs.

Q. How long would this condition last? [37]

A. Approximately an hour.

Q. Is there any set pattern to it?

A. No, sir, there's no set pattern. It depends on the amount of walking I do, or standing.

(Testimony of Hufford Donald Maynard.)

Q. Did you have any medical treatment for your condition while you were home?

A. No, sir, I didn't.

Q. Did you see a doctor at all?

A. While I was at home?

Q. Yes. A. No.

Q. Is there any particular reason for that?

A. No, sir, there's no particular reason.

Q. How long did you remain at home?

A. Forty days.

Q. Where did you go then?

A. I went to Camp Stoneman, California, in preparation for going back overseas.

Q. Did you return to your station?

A. Yes, I did.

Q. And where did you return?

A. To Tachikawa, Japan.

Q. Now, what kind of work were you doing there, Mr. Maynard?

A. That was a clerical job. It was supply records. It [38] involved supervising Japanese personnel and approving of inventory forms.

Q. Did this involve any manual labor?

A. No, sir, it didn't.

Q. What was your physical condition with respect to your feet and legs at that time?

A. At that particular time they didn't bother me too much, because, as I stated, I didn't involve myself in any type of work other than just setting down.

(Testimony of Hufford Donald Maynard.)

Q. Did it bother you at any time?

A. When I went back overseas?

Q. Yes, at that time.

A. Yes, it did. We had parades and inspections, and the length of time that we stood there would bother me considerably.

Q. Is there any way that you found that you could relieve the trouble you were having?

A. The only way I found was to lay down and take a bath in hot water.

Q. How long did you remain in Japan then?

A. About eight months.

Q. And where did you go then?

A. I went to an Air Force base in Montgomery, Alabama.

Q. And how long were you there?

A. Approximately two months, for discharge.

Q. Were you released from the service then?

A. Yes, sir, I was.

Q. Where did you go then?

A. I went back home to Alabama.

Q. Now, were you still having any difficulty with your legs at that time?

A. Occasionally I would.

Q. Would you describe how often you had difficulty?

A. I couldn't say a definite pattern on it. It depends. I couldn't do a normal amount of walking without the legs started hurting me. It's just impossible to set a certain amount of—a certain pattern.

(Testimony of Hufford Donald Maynard.)

Q. Well, on an average over a week's period of time what difficulty would you say you had in a typical week? A. Two or three times.

Q. For how long a period of time, Mr. Maynard, on the average?

A. On the average of three hours.

The Court: What were those three hours referred to? What happened during those three hours? A. Sir, he asked me——

The Court: You tell the Court what happened during those three hours.

A. The legs would continue hurting.

The Court: For that length of time, is that [40] what you mean to say? A. Yes, sir.

The Court: Or do you mean something else?

A. No, sir, that's what I meant to say.

Q. (By Mr. Riley): How would obtain relief from that then, that condition?

A. Usually I lay down and raise my feet slightly, but I found that setting in a bathtub with hot water, as hot as I could stand it, would relieve it faster than anything.

Q. How long then did you remain in your home in Alabama? Just in months approximately, Mr. Maynard.

A. Approximately two or three months.

Q. Where did you go then?

A. I went to Memphis, Tennessee.

The Court: Did you learn how to say "Tennessee" there or here? A. Pardon?

(Testimony of Hufford Donald Maynard.)

The Court: Did you learn how to say "Tennessee" there or here? A. There, I suppose, sir.

The Court: You may inquire.

Q. (By Mr. Riley): Were you employed there, Mr. Maynard? A. Yes, I was.

Q. What type of work did you have there? [41]

A. It was for the Fisher Lime and Cement Company. I guess you would consider it a warehouse clerk for city sales. You would walk through the warehouse locating different items, out in the yard to check and see if they had a particular type of brick, just general locating items that they had sold.

Q. How long did you stay with that employment?

A. I stayed there approximately nine months.

Q. Any reason for leaving there? A. Yes.

Q. What was that?

A. They decided they had to make a reduction in their personnel.

Q. Were you still having trouble with your legs then? A. Yes.

Q. Would you describe again what difficulties you were having at that time?

A. The amount of walking would bother them. It would make them ache, a real tightness to them, and I would set down each time I had a chance, which wasn't very often, and then when I got home I would immediately lay down.

Q. All right. What was your next occupation?

(Testimony of Hufford Donald Maynard.)

A. Ford Motor Company.

Q. And where was that?

A. Detroit, Michigan. [42]

Q. And would you state now about when this took place? A. In the summer of 1953.

Q. What type of work were you doing there, Mr. Maynard?

A. That was—it was under the production control. I kept records of the particular type of job, the number of man hours that were spent working on it.

Q. Were you walking or standing or what?

A. I had a job setting down.

Q. Did you have any particular difficulty there with your legs and feet?

A. Occasionally they would bother me.

Q. Under what conditions——

The Court: When you were a young fellow did you do any plowing of corn or cotton?

A. No, sir, I never plowed.

The Court: Did you ever do any leg work like 'coon hunting at night and staying out a long time at night and getting tired?

A. No, sir, I never participated in sports or anything like that.

The Court: So you can't compare the trouble you had with your legs and feet at these times while in Memphis and later with that kind of fatigue, can you? From personal experience, I mean.

(Testimony of Hufford Donald Maynard.)

A. Except from the service from hikes and [43] so forth.

The Court: I was trying to see if there would be any difference in kind as to symptoms from the kind that comes from fatigue to a young fellow than that which came from what you thought this came from.

A. No, sir, it was a different feeling from being tired. It actually was a ache there.

The Court: You may proceed.

Q. (By Mr. Riley): How long did you remain employed by Ford Motor Company?

A. To July, '54.

Q. By the way, Mr. Maynard, how old are you now? I haven't asked you that.

A. I am twenty-eight. I'll be twenty-nine in June, June 5th.

Q. And at the time of the crash how old were you again? A. Twenty-four.

Q. How long had you been in the service at the time of the crash? A. Almost four years.

The Court: Before this accident what was the state of your health, your general health?

A. Excellent.

The Court: Did you have any trouble with [44] the circulation of blood in your legs?

A. No, sir.

The Court: You may inquire.

Q. (By Mr. Riley): Did you have any difficulty of any kind similar to what you have experi-

(Testimony of Hufford Donald Maynard.)
enced subsequent to the crash of the aircraft?

A. No, sir, I haven't.

Q. What types of strenuous activity had you engaged in when you were in the service for those four years that would give exhaustion?

A. Parades, standing a long time at the parade, or inspections, something of that nature.

Q. Did you go through basic training in both the Navy and the Air Force?

A. In the Air Force I went to what they call a two weeks indoctrination, where they give you clothes and shots and that's all, there was no basic training.

Q. You testified that you were in the Navy. Did you take basic training with them?

A. Yes, I did.

Q. During any of your courses of indoctrination and basic training did you have any difficulties with your legs or feet?

A. I don't recall right now any particular instant.

Q. Were you having any difficulty with your legs and feet [45] or any other portion of your body at the time of the crash of the aircraft?

A. No, I wasn't.

Q. Where did you go after you left the Ford Motor Company then?

A. I was looking for a job and I couldn't find one then, and so I decided I would see if I could get back into the service again, and by going into

(Testimony of Hufford Donald Maynard.)

the service I could have retained my seniority with the company, because when they laid me off there they put me available to the union labor pool, which I could bump if I had sufficient seniority, which I didn't have, and so I went to the various branches of the service to get in at a rank approximately to what I got out of the Air Force with, which in this case it was the Marine Corps.

Q. Did you enlist then in the Marines?

A. Yes, I did, in the Class 3 Reserve.

Q. Where were you stationed first?

A. I first went to the Parris Island Marine Recruiting Depot.

Q. Did you go through basic training there?

A. Yes, I did.

Q. Did you have any difficulties there?

A. Yes, I did. [46]

Q. What were the difficulties?

A. A real sharp pain in my right leg from the hikes, and their—what they call close order drill.

Q. Did you consult a doctor while you were in the Marines about this problem?

A. No, I did not, not—excuse me. You say while I was in the Marine Corps?

Q. Yes. A. Yes, I did.

Q. All right. What was—

The Court: When was this? How long after the accident was this?

A. When I joined the Marine Corps, sir?

The Court: Yes. A. Two years.

(Testimony of Hufford Donald Maynard.)

The Court: You began the Marine Corps service two years after the accident, is that right?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Riley): How much of the time, or would you state how often you had difficulty then with your legs while you were in the Marine Corps?

A. Every time we would have a hike or a considerable amount of drilling, which was practically every other day.

Q. How did you obtain relief from that? [47]

A. The only thing I could do was take a shower each night, hot shower.

Q. How long did you stay in the Marines?

A. Two years.

Q. During all that time did you have continuing difficulty? A. Yes.

Q. How often did you have your trouble?

A. There's no set pattern on how often I had it. I couldn't do the normal amount of walking or standing without the legs starting to bother me. I went to see a doctor about the legs because when I would take the hikes I would have to set down and quit the hike, and they would chew me out for that, so I went——

The Court: They did what, chew——

A. Chew me out, yes, sir, bawl me out, and I went to see this doctor, and he made me take off my shoes and socks and he looked at my feet and legs and he says, "I don't see anything, so I can't

(Testimony of Hufford Donald Maynard.)

do anything for you," or something to that effect, and so I forgot about it. I didn't figure that they were interested in helping anybody.

Q. (By Mr. Riley): How long did you stay at Parris Island?

A. Approximately thirteen weeks.

Q. Where did you go after that?

A. Camp Pendleton, California. [48]

Q. And how long were you there?

A. Approximately a month and a half.

Q. Where did you go then?

A. To Camp McNair, Japan.

Q. What kind of work did you do or what kind of duty were you assigned to in the Marines at the time you were shipped overseas again?

A. Electronics technician.

Q. Would you describe it? Did it involve shop work, standing or walking or what?

A. It was definitely shop work with the exceptions of going out in the field. They had a considerable amount of field problems, playing war, and normally I was involved in going to the field with that.

Q. While you were in Japan then did you have any or any less difficulty with your legs?

A. I had more.

Q. And do you know why?

A. Do I know why?

Q. Yes. Or why did you have more trouble?

A. Because I was—I had to walk more frequently, more hikes.

(Testimony of Hufford Donald Maynard.)

Q. Were you able to get any relief?

A. None other than taking a hot bath.

Q. How long did you remain in Japan? [49]

A. Approximately fourteen months.

Q. Were you doing the same work all the time that you were there? A. Yes, I was.

Q. When did you leave Japan?

A. February of '56.

Q. And where did you go?

A. To the Marine Corps Supply Base, Albany, Georgia.

Q. And how long were you there?

A. Until July 21st.

Q. Of what year? A. '56.

Q. And then where did you go?

A. I went back by home for a short visit and then I went back to Detroit.

The Court: You were discharged in Georgia at the Georgia camp in 1956?

A. Yes, sir, in July, July the 21st.

Q. (By Mr. Riley): How long had you been in the Marines then at the time you were discharged? A. Two years.

Q. Isn't that a short term?

A. Yes. It's a special deal they have for the Reserve, two years active, one year inactive.

Q. What job then did you take or what employment or work [50] were you doing then when you returned to Detroit?

A. The job I got when I returned to Detroit,

(Testimony of Hufford Donald Maynard.)

it's a clerical job in the tool and die plant for Ford Motor Company. It involves making out time cards, filling the job orders for the different tools and dies that they make.

Q. Are you walking or standing or——

A. Setting down at a desk.

Q. Are you having more at this time, or at the time you took this job were you having more or less difficulty with your legs than you were having in Japan, for instance?

A. A considerable amount more.

Q. Say again.

A. A considerable amount more.

Q. And why was that, or do you know?

A. I don't know why.

Q. Would you describe the frequency with which you had this difficulty?

A. There's no set pattern. For an example, if I were outside washing my car and doing a good job on it, the amount of time and walking involved in washing a car, my legs will start bothering me. Now, some days if I lay around and don't do anything it doesn't bother me, but if I'm doing—say going shopping or doing [51] any—not an awful amount of walking, less than a normal person would do, it will start bothering me.

Q. All right. Then when it bothers you, how does it bother you?

A. It's a real tight pain within. It's got a throbbing pain to it.

(Testimony of Hufford Donald Maynard.)

Q. Now, do you have any difficulties with your legs in the work that you're doing now?

A. Occasionally they'll bother me at the particular job that I'm doing right now.

Q. When you say occasionally, how often do you mean?

A. Well, I mean if I have a lot of work to do and I set there and do it without getting up and walking around it will bother me, but if I can vary it a little bit, then it won't bother me too much.

Q. What do you mean, vary it?

A. From setting or standing.

Q. Does the cold affect your condition at all?

A. Yes.

Q. In what way?

A. It makes my legs start aching and it turns my feet a little colorless.

Q. Do you feel that your condition restricts your ability to work?

A. If the job—if I had an offer for a job [52] that had a——

Mr. Karr: Just a moment, please. I don't think we should go into an offer for a job he has had, Your Honor.

The Court: Is there any reason why the Court should not sustain that objection?

Mr. Riley: Well, I've asked him, Your Honor, if his condition restricts his ability to work, and I don't know what he's going to say, but——

The Court: The objection is overruled. The Court

(Testimony of Hufford Donald Maynard.)

will not be bound by his answer, but will consider it.

A. I was going to say if I was offered a job that had a lot of walking involved in it that paid more than the particular one I had now, then I would consider this to keep me from earning a better job or more pay.

Q. (By Mr. Riley): What type of job do you feel you have to have because of your condition?

Mr. Karr: That is objected to.

Mr. Riley: I'll strike that.

Q. (By Mr. Riley): Do you feel that you have to have a particular type of job because of your condition? A. Yes.

Q. And what type of job would that be?

The Court: "Is it" is the question; not "would be", but "is it". [53]

Mr. Riley: All right. Thank you, Your Honor.

Q. (By Mr. Riley): What type of job is it that you feel you would have to have because of your condition?

A. The type of job that would require most of the work performed setting down.

Q. Mr. Maynard, during the last two weeks, for instance, have you had any difficulty with your legs?

A. Yes.

Q. All right. Would you tell the Court what difficulty you have had?

A. The most recent trouble I had was yesterday, last night, for example, walking from——

(Testimony of Hufford Donald Maynard.)

Q. I can't hear you, Mr. Maynard.

A. I said the most recent trouble I've had was last night, walking from Fifth and Pine, I think it is, Street, up here to the courthouse yesterday afternoon. The usual tightness and pain.

Q. How long did that last, Mr. Maynard?

A. It lasted till about eleven o'clock last night.

Q. What other difficulty have you had in the last couple of weeks?

A. There was one other particular time the other week that the leg was bothering me real bad, but for the last week or so I haven't been doing much of anything because [54] I've been waiting for this trial and I've been laying around the room most of the time.

Q. How did you come to Seattle from Detroit?

A. How did I?

Q. Yes. A. By Greyhound Bus.

Q. Did you have any difficulty with your legs during your trip out here?

A. After about the first day on the bus the legs started to get the tightness to them. It didn't actually start to ache, but the tightness to them. Before the legs start aching they seem to get a tightness to them, before they start aching, but on the trip out they didn't start aching but they had the tightness to them.

Q. All right.

Mr. Riley: If Your Honor please, it is noon and

(Testimony of Hufford Donald Maynard.)

I had one question I wish to direct to the Court before you recess.

The Court: You may proceed with it now.

Mr. Riley: I beg pardon, Your Honor?

The Court: Proceed with your question now.

(There was a discussion concerning the calling of an out-of-town witness.)

Q. (By Mr. Riley): One other question, Mr. Maynard. Did you lose any personal property in the crash of this [55] aircraft? A. Yes, I did.

Q. Would you tell the Court what it was?

A. That was a portable radio, a watch, wristwatch, a Ronson cigarette lighter, a gold identification bracelet, which those last two items I just got for Christmas, I had never worn 'em, and I had some what I consider important papers; for example, my Navy discharge and picture album with pictures, photos, and a few cheap Orient souvenirs.

Q. What value do you place to the best of your ability, if you recall, on those items that were lost in the crash of the aircraft?

A. Well, for the cigarette lighter and the identification bracelet, I don't know how much they cost because, as I said, they were a present. The radio cost \$37.00 at the Post Exchange. The wristwatch was forty some dollars.

Q. Would you estimate a value, please, on the other items, just a general value, what you think they are worth in the aggregate, other than the watch and radio?

(Testimony of Hufford Donald Maynard.)

A. For the photo album and the papers I couldn't put a monetary value on it, but the souvenirs, about \$20.00.

Q. The other items that were gifts to you, can you approximate what it would cost to replace them? [56]

A. Well, the Ronson cigarette lighter was the windproof type with the leather covering. I suppose that would cost somewhere around eight or nine dollars. And the identification bracelet would cost about twenty.

The Court: Identification what?

A. Bracelet, sir. Gold identification bracelet.

Q. (By Mr. Riley): What physicians have you seen since the accident, since the crash of the aircraft, Mr. Maynard, in chronological order?

A. The first doctor I seen was the Navy doctor when I was in the Marine Corps. The second one was Dr. Cornwell in Birmingham, Alabama.

Q. When did you see him?

A. That was in 1956.

Q. Have you consulted physicians here in Seattle? A. Yes.

Q. For the purposes of examining you before trial? A. Yes.

Mr. Riley: I have no further questions of Mr. Maynard, if the Court please.

The Court: At this time we will take the noon recess until 1:30 this afternoon.

(At 12:05 o'clock p.m., a recess was taken until 1:30 o'clock p.m.) [57]

Tuesday, March 26, 1957.

1:30 o'clock p.m.

(All parties present as before.)

The Court: All are present. You may proceed.

Mr. Karr: I think Mr. Maynard was on the witness stand.

The Court: The witness will kindly resume the stand for further interrogation.

HUFFORD DONALD MAYNARD

(resumed the stand.)

Mr. Riley: May it please the Court, at this time I would like to state that at the commencement of the cross examination of the witness, that it is perfectly permissible with us and we offer to permit Counsel to go beyond the scope of direct for the purpose of their own direct examination for the purposes of defendant's case if they wish, it being my desire at the close of Mr. Maynard's testimony to ask that he be excused, the reasons being, as Mr. Maynard can show to the Court, that he has been absent from his employment since the 4th of March in order to attend the deposition to which we stipulated with Counsel for the defendant and in attendance on the Court since the 12th waiting for the commencement of this trial, and it is working a very grave hardship and his employment is in jeopardy. [58]

(A discussion was had among the Court and Counsel.)

The Court: You may proceed.

(Testimony of Hufford Donald Maynard.)

Cross Examination

Q. (By Mr. Karr): Mr. Maynard, at the time of this accident in January of 1952 you were then with the U. S. Air Force, were you not, sir?

A. Yes, sir, that's right.

Q. And at that time I think you said this morning you were twenty-four years old. Would twenty-three be correct?

A. I was born on June 5, 1928.

The Court: June what?

A. 5th, 1928.

Q. (By Mr. Karr): So in June of 1952 you would have become or you did become twenty-four?

A. (Witness nods his head.)

Q. Now, at the time of the accident how long had you been in the Air Force, Mr. Maynard?

A. Approximately three years.

Q. About three years. So you were around twenty when you entered the Air Force?

A. Yes, sir. [59]

Q. And what had you done prior to that in the way of employment?

A. Right immediately to that joining the Air Force I was going to a business college in Birmingham.

Q. How long did you attend that business college?

A. Approximately eight or nine months.

Q. And prior to that had you been employed in some way?

A. No, sir.

Q. Were you in school up to that time?

(Testimony of Hufford Donald Maynard.)

A. No, sir. I joined the Navy in 1945 and I was discharged from the Navy in December of '47.

Q. I see. So you were in the Navy about two years? A. Yes, sir.

Q. What was the nature of your assignment in the Navy?

A. That was—actually I never did obtain any significant rank. It was seaman, but I was striking for what they call shipfitter's helper. That's taking care of the water mains and steam pipes and so forth.

Q. Where had you done your Navy duty, Mr. Maynard?

A. Part of it in California and part of it in Washington.

Q. And the two years more or less that you were in the Air Force prior to this accident, where had you been on duty?

A. The majority of the part was in Japan.

Q. Had you made more than a single trip overseas? [60] A. That was the first time.

Q. This was your first return, at the time of the accident was your first trip back?

A. Yes, sir, to the States.

Q. Was your Navy duty all on land or was some of that on sea?

A. I was on one commissioned ship, but it was shortly after that decommissioned. Most of it was on land.

Q. I see. What was the type of work you were

(Testimony of Hufford Donald Maynard.)

doing in Japan in the Air Force just preceding the accident? A. It was supply records.

Q. Clerical work? A. Yes, sir.

Q. And that's the type of work you had done in the Air Force, is it, up to that time?

A. Yes, sir.

Q. Your Air Force experience then hadn't included any of the technical aspects of flying?

A. No, sir.

Q. You had not flown a plane or never had training of that kind? A. No, sir.

Q. So your observations of conditions at the time of this flight or in connection with this flight are not from a technical standpoint but just from the standpoint of [61] a layman? A. Yes, sir.

Q. In the course of your two years Navy experience and two years Air Force experience prior to the accident had you ever seen a life vest?

A. Have I ever seen one?

Q. Yes. A. Yes.

Q. In the course of your Navy experience and two years of Air Force training had you ever had any instruction on the use of a life vest?

A. Yes.

Q. Both in the Navy and the Air Force, didn't you? A. Yes.

Q. So you knew how to use one? A. Yes.

Q. Now, can you tell us, I didn't get clearly, just about when it was you left Tokyo on this flight?

A. What do you mean, about? Are you speaking—

(Testimony of Hufford Donald Maynard.)

Q. About what time of day?

A. I think it was somewhere around noon.

Q. And you had been en route how long, thirty-six hours, at the time of the accident, more or less, is that right? A. Yes, sir, more or less. [62]

Q. The accident happened shortly after midnight, did it not? A. Yes.

Q. Your last stop prior to the accident had been at Anchorage, Alaska, I believe. Is that correct, sir? A. Yes, sir.

Q. And you got away from Anchorage that evening or afternoon about what time?

A. I don't know exactly from my own standpoint. I know this, that the sun was shining there in Alaska. I can't recall exactly what time it was.

The Court: When the accident happened?

A. No, sir, when we left Anchorage.

Q. (By Mr. Karr): In other words, when you left Anchorage preceding the accident it was still daylight? A. Yes.

Q. The accident happened sometime after midnight the following day? A. Yes.

Q. During that interval of six or eight or ten hours, whatever it may have been, were you awake at all times or did you sleep on the plane?

A. I don't recall whether I was or not. Possibly I may have catnapped.

Q. Well, up until the time of the accident after midnight [63] you had slept a good deal, hadn't you, Mr. Maynard? A. Yes, I had.

Q. During the flight? A. Yes, sir.

(Testimony of Hufford Donald Maynard.)

Q. So there may have been communications to the passengers by the crew members or by the stewardess that you might not have heard if you were asleep. Is that a fair statement?

A. If they had made any, yes.

Q. Now, as I understand it you weren't aware of anything unusual in the operation of the plane prior to the time it went in the water; is that right?

A. That's right.

Q. You later learned that it had been flying on three engines for a period of time approaching Sandspit? A. Yes, sir.

Q. Were you asleep when the plane landed at Sandspit? A. No.

Q. How long prior to the landing had you awakened, Mr. Maynard?

A. I don't know. I didn't say that I was asleep. I don't remember being asleep from Anchorage to the accident.

Q. You don't remember being asleep from Anchorage to the accident? [64] A. That's right.

Q. But you say you may have catnapped during some of that time? A. It's possible.

Q. Mr. Maynard, do you remember my taking your testimony a week or two ago here in Seattle?

A. Yes, sir, I do.

Q. Do you recall my asking you in the course of that testimony, "Had you been sleeping at all while you were on the flight?" and your answering me, "Oh, yes." A. Yes, I did sleep.

(Testimony of Hufford Donald Maynard.)

Q. But as the plane approached Sandspit, as I understand it, you were awake at that time?

A. Yes, sir.

Q. And you noticed nothing unusual in the flight of the plane? A. No, sir, I didn't.

Q. Or in its landing at the airport, there was nothing unusual in the landing?

A. That I knew of, no, sir.

Q. Now, from the time the plane touched down, Mr. Maynard, at Sandspit and then power was applied and it took off again, was there more than an interval of seconds before it hit the water?

A. What do you mean, more than an interval of seconds? [65]

Q. Well, was it more than just a few seconds from the time it took off from the Sandspit airport until the plane hit the water?

A. I would say it was about—I mean actually I don't really know how long it was, but it was a very short period of time.

Q. It seemed practically instantaneous, did it?

A. Pretty near so, yes.

Q. After the plane settled on the water, Mr. Maynard, I understand you undid your seat belt.

A. Yes, sir.

Q. The seat belts were fastened because the stewardess had advised the passengers in advance of the landing to fasten the seat belts?

A. Yes.

Q. And you were sitting near one of the emergency exits on the plane? A. Yes, sir.

(Testimony of Hufford Donald Maynard.)

Q. Who opened that door, Mr. Maynard, if you know?

A. I was attempting to help open the door myself.

Q. I see, and how long did it take to get the door open?

A. Just a matter of a couple of seconds.

Q. Who was first out the door, do you know? Were you?

A. I don't really recall. I was about the second one out.

Q. I see. So you weren't in the plane then very long [66] after it landed on the water?

A. No, sir.

Q. Now, at the time of the approach to Sandspit and the landing the stewardness was where in the plane, if you know?

A. I don't know, sir.

Q. You were up over the wing?

A. Yes, sir.

Q. Which more or less would be forward in the plane, is that right?

A. Yes, sir.

Q. She was to the rear some place from where you were, was she not?

A. I don't know.

Q. You don't remember. And between the time the plane landed on the water and you got the door open and out you didn't see the stewardess?

A. No, sir, I didn't.

Q. You don't know what she did or may have done to assist the passengers?

A. No, sir, I don't.

Q. I assume that the pilot and the co-pilot were in the pilots' cabin at the time of landing and at

(Testimony of Hufford Donald Maynard.)

the time of the accident? A. Yes, sir. [67]

Q. You said something about there being some light clouds, I think, at the time the plane landed. Am I correct in that, that there were light clouds or broken clouds at the time of the landing?

A. From looking out of the window you could see blots of clouds going by the aircraft.

Q. During the time you were on the wing, Mr. Maynard, before you were rescued, was it pitch dark or was the moon out, or just what was the condition?

A. It wasn't really pitch dark, but it wasn't a real bright moonlit night. You could see about from here to you, but it was just more or less of an outline.

Q. Do I understand the moon was out at times?

A. Yes, sir.

Q. Now, after you were rescued, Mr. Maynard, and left the wing of the plane and were taken into the house there at Sandspit, is it my understanding that a doctor saw you that same morning?

A. About ten o'clock.

Q. And I believe you said that he examined for broken bones or other injuries.

A. Yes, sir.

Q. And you had no broken bones?

A. No broken bones.

Q. I think you said you had a scratch, did you?

A. Yes, sir.

Q. Was that a minor matter? A. Yes, sir.

Q. It healed up in a matter of days?

(Testimony of Hufford Donald Maynard.)

A. Yes, sir.

Q. And you referred to a bruise. Was that something that cleared up in a matter of days?

A. Well, the bruise, sign of a bruise is still there, but it hasn't given me any trouble.

Q. Did that doctor see you on more than that one occasion, Mr. Maynard? A. No, sir.

Q. And you were at Sandspit for about two days, as I recall. A. Yes, sir.

Q. Now, during that two days were you confined to your bed the entire time or were you up and about part of the time?

A. We got up one time that I remember of. That was when the Canadian Mounted Police were questioning us, and other than that we had our meals in bed until the day that we left.

Q. You say you were up when the Canadian Mounted Police questioned you?

A. We got up then. [69]

Q. Did they assemble you all in a room, is that it, or something of that kind?

A. Well, the men, the seven of us—well, Lieutenant Baker and myself were in one room and the others were in different rooms. We had to go into—I believe it was the kitchen.

Q. Were you able to walk to the kitchen?

A. I could walk, but I wasn't very steady at it.

Q. But you did walk to the kitchen on that occasion, and then during that two days you were there at Sandspit were you able to walk back and forth to the bathroom? A. Unsteadily, yes.

(Testimony of Hufford Donald Maynard.)

Q. When you left Sandspit, Mr. Maynard, I think you said you were driven to the airport by automobile. A. Yes.

Q. When you left the house there at Sandspit and went to the automobile did you walk out to the car?

A. The Canadian Royal Air Force or Canadian Air Force, they assisted us. There was a Canadian doctor there and his assistant, and they gave us these big flight boots to wear, all of us, and these clothes, and we hobbled out to the car with their assistance.

Q. I understand they gave you the flight boots, but do I understand you got out to the car under your own power? A. More or less, yes. [70]

Q. Now, at that time with reference to the condition of your feet, Mr. Maynard, there two days after the accident, they weren't very badly swollen then, were they, sir?

A. Yes, sir, they were.

Q. And as a matter of fact they weren't very much discolored even then, were they, right after the accident? A. Yes, they were.

Q. Do you remember again the deposition we took on the 7th day of March here in Seattle?

A. I remember the day, yes, sir.

Q. And your Counsel was there, was he not?

A. Yes.

Q. Do you remember I asked you about this same condition at that time?

A. I truthfully don't remember the question.

(Testimony of Hufford Donald Maynard.)

Mr. Karr: Page 25, Mr. Riley.

Q. (By Mr. Riley): At that time, Mr. Maynard, didn't I ask you, "While you were there at Sandspit were your feet and legs swollen enough so it was pretty obvious?" and didn't you answer me, "It was obvious to me. I don't know, maybe some people might not have noticed it." Did you tell me that? A. I guess I did.

Q. And didn't I say, "I see, and were they discolored at [71] that time?" and didn't you reply, "Well, kind of a bluish, reddish, whitish color—well, it wasn't really discolored." Didn't I say, "But it didn't look quite natural to you?" and you answered, "Right." And I said, "But not"—and you interrupted me and said, "Not technically."

The Court: Not what?

Mr. Karr: Technically.

Q. (By Mr. Karr): And my question was, "Not a great deal of difference from normal?" and you answered, "Right." Wasn't that what you told me about three weeks ago, Mr. Maynard?

A. I guess so.

Q. Now, from Sandspit you went to McChord Field, as I understand it. A. Yes.

Q. And the accident happened on January 19th. I suppose you got to McChord about the 21st, is that right? A. The 21st, 22nd, yes.

Q. And you were there, as I understand it, for three or four days.

A. I don't exactly remember how long we stayed there because they gave us some sleeping pills and

(Testimony of Hufford Donald Maynard.)

we went to sleep at the hospital and I lost—from that accident on till I left Oakland I more or less just [72] lost track of the days, but the best I remember, we got in there in the afternoon and the following night about nine o'clock or something like that they took us to—well, some airfield, to see if they had available military aircraft for us to go home. They took us all there, and I had to pay for my transportation from California to Alabama, and I caught the airplane that morning about six o'clock.

Q. Would this be roughly three or four days after you had arrived at McChord?

A. Yes, it would have been roughly that.

Q. As I understand, when you got to McChord you were put to bed. A. Right.

Q. And you were in bed for the period of time you were at McChord, or were you up and about part of the time?

A. They wouldn't let us get out of bed. We was in bed continuously until we left.

Q. I see, and what kind of treatment were you given there? I mean medical treatment.

A. We were given penicillin and pills, of what description I don't know. They were pills, and sleeping pills.

Q. I see, and bed rest, is that it? A. Yes.

Q. And when you left McChord then were you on your feet [73] and able to walk then?

A. Yes.

Q. I think you said you were wearing flight boots when you left McChord.

(Testimony of Hufford Donald Maynard.)

A. They were Arctic boots.

Q. Arctic boots, and you wore them, I believe you said, for two days after you got back to Jasper, Alabama.

A. Yes, sir.

Q. And you were home in Jasper about a week after the accident, is that correct, maybe a little less?

A. Yes, sir.

Q. You were home then for how long, Mr. Maynard?

A. Oh, approximately forty days. I had a thirty day leave and I got a fifteen day extension, which I allowed myself about five days to get back.

Q. Did you go to bed when you got home, Mr. Maynard, or were you up and about?

A. I got home about—the best I remember, somewhere around nine o'clock that night, and so I went to bed. There was no place else to go.

Q. I see, but what I meant was then the next morning did you get up?

A. Well, I stayed home all the time except when I went to the hospital to see my mother, which was only nine miles away. [74]

Q. Were you confined to your bed while you were at home, or were you——

A. Were I confined? No, sir, I wasn't confined to bed.

Q. Now, you say you went to the hospital to see your mother, which was nine or ten miles away?

A. It was nine miles away.

Q. Nine miles away, and how did you go there?

A. By automobile, car.

(Testimony of Hufford Donald Maynard.)

The Court: Where was that hospital?

A. That was in Russellville, Alabama.

The Court: Did Jasper have any hospital at that time?

A. Well, sir, he made a mistake. My home isn't in Jasper, it's in Spruce Pine, a little town.

Q. (By Mr. Karr): I'm sorry, I got mixed up. When you went home it was to Spruce Pine rather than Jasper? A. Yes, sir.

Q. I'm sorry. And then you went to Russellville to visit your mother who was in the hospital?

A. Yes, sir.

Q. And during the some forty days more or less that you were home did you visit her regularly?

A. Sometime I'd go one time a day, sometimes two, and sometimes I would—in fact, she only stayed in the hospital about three or four days after I got there. [75]

Q. Oh, I see. How did you get back and forth to the hospital? A. By car.

Q. Did you drive the car? A. Sometime.

Q. Did you say she was only there three or four days after you got to Spruce Pine?

A. Yes. You see, my dad can drive and my sister can drive, and we'd change up.

Q. Will you keep your voice just a little higher? I have trouble hearing you at times.

A. I say I couldn't say how many times I drove there.

Q. But you did drive the car back and forth to

(Testimony of Hufford Donald Maynard.)

the hospital after you got home while your mother was still in the hospital, did you, sir?

A. Yes.

Q. On more than one occasion?

A. I can't—yes, I'll say more than one occasion.

Q. During that period of forty days that you were home, Mr. Máynard, following the accident, I understood you to say you had some trouble with your feet and legs.

A. Yes.

Q. Did you have any medical attention at Spruce Pine?

A. No, sir, I didn't.

Q. Did you consult a doctor at all about that condition? [76]

A. No, sir.

Q. And when you were at the hospital seeing your mother did you consult a doctor under those circumstances about the trouble you were having?

A. No, sir.

Q. And I believe you said you returned to Japan about—when was that?

A. About two months afterward.

Q. Would it be around the middle of March of 1952, would it?

A. I guess.

Q. When you got back to Japan you went back to the same base, did you, where you had been staying before your leave started?

A. The same base.

Q. Did you return to the same duty you had had prior to the accident?

A. Yes, sir.

Q. The same assignment?

A. Same assignment.

Q. Same work?

A. Same work.

(Testimony of Hufford Donald Maynard.)

Q. And how long did you continue on that assignment then, Mr. Maynard?

A. Continuously till I left Japan. [77]

Q. And that was approximately when?

A. About two months before I got discharged from the Air Force.

Q. Does that make it the latter part of 19——

A. That was in the fall, yes, sir.

Q. Were you in Japan throughout the balance of 1952? You say you went back about the middle of March, something like that. Were you there for a full year or was it a year and a half?

A. It was about—it was less than a year when I went back.

Q. Less than a year. So it would be near the end of 1952 or early in '53 when you came back to the States, would it?

A. Yes, sir.

Q. During that nine months or a year that you were over in Japan following the accident did you have any medical treatment for the condition of your feet or legs?

A. No, sir.

Q. Did you consult a military doctor about it?

A. No, sir.

Q. You had a doctor there on the base, I suppose.

A. Yes, sir.

Q. Did you consult any civilian doctor on the subject?

A. In Japan you couldn't; you wasn't allowed to consult 'em. [78]

Q. So you had no treatment nor consulted anyone?

A. Yes, sir.

(Testimony of Hufford Donald Maynard.)

Q. During that nine months or a year, Mr. Maynard, that you continued in the Air Force after the accident, were you off duty at any time for medical conditions or were you on duty all the time?

A. I was on duty all the time.

Q. You didn't miss any time because of this condition? A. No, sir.

Q. You were discharged from the service at the end of that tour of duty, weren't you?

A. Yes, sir.

Q. Was your discharge for medical reasons or just a discharge because you finished your job?

A. My term of enlistment was up.

Q. I see. It was not a medical discharge?

A. No, sir.

Q. Now, after that term of service with the Air Force concluded I believe you said after a brief period at home you then went to work in Memphis, Tennessee? A. Yes, sir.

Q. And that was about when, Mr. Maynard?

A. About a week after I got discharged.

Q. Would that be in the late winter or early spring?

A. It was about the last of February. [79]

Q. Of 1953? A. Yes, sir.

Q. That would be then a little more than a year after the accident? A. Yes.

Q. I think you said you stayed on that job for something like nine months, — eight months, nine months, something like that?

A. Something like that.

(Testimony of Hufford Donald Maynard.)

Q That was the place where you were working as a clerk in the warehouse? A. Yes, sir.

Q. In connection with putting up orders for the trade? A. Yes, sir.

Q. How much did you make in that employment, Mr. Maynard?

A. Seventy cents an hour, I believe it was.

Q. Seventy cents an hour, and what did you work? A. Pardon?

Q. What did you work, a forty hour week?

A. Forty-eight.

Q. A forty-eight hour week. During the period you worked in Memphis, Mr. Maynard, were you off work at any time because of medical condition,—physical condition I should say?

A. No, sir. [80]

Q. You didn't lose any time from your job because of physical trouble? A. No, sir.

Q. And during that period you were in Memphis when you were describing the pain and discomfort you felt, did you consult a doctor in Memphis about your trouble? A. No, sir.

Q. Did you have any treatment for your condition? A. No, sir.

Q. From Memphis I think you said you went to Ford Motor Company? A. Yes, sir.

Q. And that was in the latter part of 1953, right? A. Yes, sir.

Q. And where, by the way, did you go to work for Ford, in Detroit?

A. Actually it's in Dearborn.

(Testimony of Hufford Donald Maynard.)

Q. I see. Near Detroit?

A. Yes, sir. Well, there's just a street that separates the two cities.

Q. What kind of work did you secure there when you first went to work for Ford, Mr. Maynard?

A. It was a clerical job.

Q. The same general type of work you had been doing both in civilian work and military work?

A. Generally, yes, sir.

Q. Did the change in the weather going from the south where you had always lived up to Detroit, did that have any noticeable effect on your condition?

A. At that particular time?

Q. When you went to Detroit and started living there, or Dearborn, and started living there.

A. When I left the south to go to Michigan it was still warm weather, so there was no difference in it then.

Q. Well, what salary were you paid or wages were you paid at Ford, Mr. Maynard?

A. Count the cost of living and the first increase in pay was——

Q. I don't think you understood my question. What did you get paid when you went to work for Ford to begin with near the end of 1953?

A. \$1.96 an hour plus cost of living.

Q. \$1.96 an hour plus cost of living?

A. Yes, sir.

Q. That's when you started to work the first day?

A. (Witness nods his head.)

(Testimony of Hufford Donald Maynard.)

Q. And how long did you stay with Ford Motor Company before you went into the Marines?

A. Till they did away with the job.

Q. And that was about how long? [82]

A. That was about July, somewhere around the first of July, 19——

Q. July of 1954? A. Of '54, yes.

Q. So you were there roughly six, seven, eight months, right? A. Yes, sir.

Q. During that period of time had you had any increase in your wages?

A. Five cents—ten cents.

Q. I beg pardon? A. Ten cents.

Q. I see. Was it five cents on one occasion and ten cents on another? A. Yes, sir.

Q. Now, I think you said your legs and feet troubled you some while you were in Detroit.

A. Yes, sir.

Q. Did you consult a doctor for your condition while you were there? A. No, sir.

Q. Or the company doctor?

A. When I took the job—no, sir.

Q. Did you consult the company doctor?

A. No, sir. [83]

Q. Did you have any treatment for the condition you complain of while you were with Ford in Detroit? A. No, sir.

Q. During that eight or nine months during the early part of 1954 while you were working for Ford did you lose any time from work because of your physical condition? A. No, sir.

(Testimony of Hufford Donald Maynard.)

Q. You weren't off a day or an hour at any time? A. No, sir.

Q. I think you said that job terminated in June of '54, did you?

A. June or July. I don't remember what month.

Q. And did I understand that then you went into the Marine Corps? A. Yes, sir.

Q. You were pretty well covering all the services, weren't you. In the Marine Corps you were assigned as a radio technician?

A. Not originally. When you first go in they don't assign you to any specific type of job; they give you a general classification, say like in the electronic field or aviation field or what have you.

Q. When was it you enlisted exactly, Mr. Maynard, if you can tell us?

A. The 22nd of July. [84]

Q. 1954? A. Yes.

Q. That would be just two years and a half after the accident almost exactly, would it not?

A. Yes.

Q. And up to that time since you had seen a doctor at McChord Field near Tacoma you had had no medical attention or consulted no one about your legs and feet, is that correct, sir?

A. Yes, sir.

Q. And hadn't missed a day of work?

A. No, sir.

Q. Now, in applying to the Marine Corps did you have a physical examination at that time?

A. Yes, sir.

(Testimony of Hufford Donald Maynard.)

Mr. Karr: I believe the medical record of Mr. Maynard in connection with his Marine Corps service, or Army service, is in the Court's custody—oh, I guess I have it here. Would your Honor indulge me for just a moment?

The Court: Yes.

(Brief pause.)

Mr. Karr: Your Honor, I think I will lay that aside for the moment and return to it just a little later. [85]

The Court: You may.

Q. (By Mr. Karr): At the time you applied for admission to the Marine Corps and they took a medical examination, the doctor at that time asked you about your medical history and background, didn't he, Mr. Maynard?

A. I don't recall. Probably he did. I don't know, I can't say yes or no.

Q. And in connection with that subject he asked you about whether you had had any trouble with your feet, didn't he?

A. I honestly don't know.

Q. And you told him you hadn't, did you not?

A. In a situation like that the way you—

The Court: Just answer yes or no, please, and then if it is necessary to make your answer true and correct you may—

A. I don't know what I told him.

Q. (By Mr. Karr): And you were also asked if you had ever had any trouble with your legs, were you not? A. I don't know.

(Testimony of Hufford Donald Maynard.)

Q. You advised that you hadn't had any such difficulties in your life, didn't you?

A. I don't know.

Q. Now, there is a trade name for a medical they give you when you go into the Marine Corps, isn't there, called [86] pulhes? A. Yes, sir.

Q. The letters are p-u-l-h-e-s, is that right, sir?

A. Something to that effect. I know what you're talking about.

Q. Beg pardon? You know what I'm talking about, don't you? A. Yes, sir.

Q. And that's a part of the standard medical examination that is given to all recruits for the Marines and they have to pass that examination in order to become a U. S. Marine, do they not?

A. Yes, sir.

Q. And you were subjected to and passed that examination, right? A. Partially.

Q. Partially. Did you never complete it?

A. Yes, but it taken me some time to complete it.

Q. I see. Now, the first letter of the examination—the letters are p-u-l-h-e-s, are they not?

A. Yes, sir.

Q. The first letter "p" stands for physical capacity and stamina, does it not?

A. I think that's what it is.

Q. And you're given various tests to determine your [87] physical capacity and stamina before you are graded on that and passed as a Marine, are you not, sir? A. Yes.

(Testimony of Hufford Donald Maynard.)

Q. And you were subjected to all those tests and passed them, did you not, or you wouldn't have gotten overseas duty?

A. To get an overseas assignment you have to have a certain qualification on that test, but—

Q. That is, you have to be higher than minimum, right?

A. Well, you have to have 1 in all of them to have an overseas assignment.

Q. And 1 is what, the highest category you can get?

A. Yes, sir.

Q. And you got an overseas assignment, did you not?

A. Yes, sir.

Q. So you passed in the highest category in all six classifications in this Marine physical test, didn't you, Mr. Maynard?

A. No, sir, not right off.

Q. No, not right off, but you did qualify later for all of them?

A. Yes, sir.

Q. Which one didn't you pass completely on the first round?

A. Psycho.

Q. That's the last of the six letters, is it not?

A. Yes, sir.

Q. But the first one which stands for physical capacity and stamina, that's the capital P, you didn't have any trouble passing that, did you, sir?

A. No, sir.

Q. And the second one, the capital U, relates to upper extremities, does it not? That's what they use the U for. You passed that all right?

A. Yes, sir.

(Testimony of Hufford Donald Maynard.)

Q. In the 1 classification?

A. (Witness nods his head.)

Q. The third one, the L, stands for lower extremities, does it not? A. Yes, sir.

Q. And you passed that?

A. (Witness nods his head.)

Q. In the 1 classification? A. Yes, sir.

Q. And the H stands for hearing, and you didn't have any trouble there? A. No, sir.

Q. And the E stands for eyes, and you didn't have any problem there, I take it.

A. (Witness shakes his head.)

Q. The last letter is S and that stands for psychiatric, [89] in the Marine alphabet anyway.

A. Yes, sir.

Q. And that's the one that for a period of time you didn't pass the 1 classification but later you did? A. Yes, sir.

Q. And those were all necessary to have an overseas assignment which you got in the Marines?

A. Yes, sir.

Q. Now, to qualify as a Marine you had thirteen weeks of boot camp training at Parris Island?

A. Yes.

Q. That's the place down in North or South Carolina that we—— A. South Carolina.

Q. South Carolina, that we read so much about in the last year? A. Yes, sir.

Q. Is that the one, same one?

A. (Witness nods his head.)

Q. You didn't have Sergeant McCune, did you?

(Testimony of Hufford Donald Maynard.)

A. No, sir.

Q. During that thirteen weeks of boot camp in the Marines did you miss any of your duties or assignments because of physical condition?

A. I can't answer that. [90]

Q. Do you not know whether you completed the whole course and——

Q. You misunderstand me. There was times when I went to the hospital for the doctors to examine me, and whatever training that the other people had there I don't know. Do you understand what I mean?

Q. Yes, I understand what you mean. Well, I suppose that everybody who was going through the Marine camp was examined at the hospital by the doctors too, were they not? A. True.

Q. And you had your turn for medical examination like everybody else did? A. True.

Q. What I was getting at, sir, was your physical condition such at Parris Island that you weren't able to do any of the things you were assigned to do? A. No, sir.

Q. You did the whole job?

A. (Witness nods his head.)

Q. I assume that included a fair number of marches of the type that we have read about in the last year? A. No, sir.

Q. You didn't have any marches?

A. Yes, I had some. [91]

Q. Following your boot training for three

(Testimony of Hufford Donald Maynard.)

months at Parris Island I think you said you were sent to Camp Pendleton in California.

A. Yes, sir.

Q. And that's sort of a staging area before they sent the Marines overseas, is it not, sir?

A. Yes, sir.

Q. And you were there for what, thirty or sixty days? A. Somewhere around there.

Q. And from there you went to Japan again?

A. Yes, sir.

Q. And you were based where in Japan?

A. Camp McNair in Japan.

Q. And about when was it you went to Japan, so we'll get the sequence of events?

A. It was in the wintertime. I don't remember what month it was.

Q. Well, I think you went into the Marines in July of '54, so it would have been maybe four or five months later, something like that?

A. Yes, sir.

Q. The latter part of '54. And you were then on duty with the Marines in Japan for something over a year, is that right, sir? A. Yes, sir. [92]

Q. During that period of over a year of Marine duty in Japan did you miss any duty or were you off duty at any time because of your physical condition? A. No, sir.

Q. Never once?

A. I don't remember of it.

Q. Did you have any medical treatment while you were in the Marines because of the condition

(Testimony of Hufford Donald Maynard.)

of your legs or feet? A. No, sir.

Q. While you were there in Japan as a Marine I suppose you had hikes from time to time?

A. Yes, sir.

Q. They would last for an hour or two?

A. Some of them did, yes, sir.

Q. Sometimes they would last for a day or two, would they not?

A. The hikes themselves actually wouldn't last a day or two.

Q. But you would be out on that kind of a maneuver? A. Yes, sir.

Q. And you took part in all of them, did you, sir? A. Not all of them, no, sir.

Q. All that you were assigned to?

A. What do you mean by that? [93]

Q. You took part in any that you were ordered to take part in, did you, sir?

A. Yes, sir, that's right.

Q. The regular assignment?

A. Yes.

Q. You weren't excused from any because of the condition of your feet or legs?

A. No, sir.

Q. I think you said your discharge from the Marines was on the 21st of April, 1956. Is that right, sir? A. Yes, sir.

Q. And that was a regular discharge, not for medical reasons? A. Yes, sir.

Q. That's right, is it? A. Yes, sir.

Q. Then you returned to what employment?

(Testimony of Hufford Donald Maynard.)

A. Ford Motor Company. Actually to the employment office to get employment.

Q. I see, and you went to work for the Ford Motor Company and that would be in the spring of '56, roughly a year ago now, is that right?

A. Yes, sir.

Q. What kind of work did you do when you went back to Ford then after your two years in the Marines? [94]

A. It was clerical work.

Q. The same type of work you had been doing right along, is that right? The same general type, I mean.

A. Yes, sir.

Q. And what was your wage rate when you went back a year ago?

A. \$1.96-1½.

Q. Was that—well, I'm confused. I thought that had been your rate when you went there on your first period.

A. It was, but you see they had done away with that job that I had before.

Q. Oh, I see. You went back on the same scale you had been on before?

A. Yes, sir.

Q. And have you had increases since you returned a year ago in pay?

A. One.

Q. One, you say?

A. Yes, sir.

Q. How much has that been?

A. Five cents.

Q. Now, during the past year, or maybe it's only eleven months, since you returned before,

(Testimony of Hufford Donald Maynard.)

have you been absent from your job at any time because of your physical condition? [95]

A. No, sir.

Q. Have you had any time off?

A. I've taken time off, yes, sir.

Q. For pleasure or personal reasons?

A. Personal reasons, yes, sir.

Q. Not because of any physical trouble?

A. No, sir.

Q. Have you had any medical attention or treatment during the past year since you've been back with Ford? A. No, sir.

Q. Well, now, as a matter of fact you have been to a doctor for the past year, haven't you, because you had a cold once?

A. Well, I misunderstood the question.

Q. Is that correct? A. Yes, sir.

Q. But you haven't gone to a doctor because of any trouble with your feet or legs?

A. No, sir.

Q. But you did on one occasion see a doctor when you had a cold, is that right?

A. Yes, sir, but——

Q. Is that right?

A. Yes, sir, that's right.

Q. Now, I think you—— [96]

The Court: Pardon me just a moment, please.

Mr. Karr: Surely, Your Honor.

The Court: How long was it before you last returned to Ford at Detroit?

A. Almost a year, sir.

(Testimony of Hufford Donald Maynard.)

Q. (By Mr. Karr): And you worked there steadily up until the time you took a leave of absence to come out here, is that right, sir?

A. Yes, sir.

Q. Up until the last few weeks, Mr. Maynard, have you seen any doctor because of any trouble with your feet or legs since you left McChord Field in January, 1952, following the accident?

A. Yes, sir.

Q. O. K. Whom did you see?

A. I seen the Navy doctor when I was in the Marine Corps and I've seen Dr. Conwell in Birmingham, Alabama.

Q. Well, let's take them one at a time now. The Navy doctor, did he give you any treatment for your condition?

A. No, sir.

Q. He examined you, did he?

A. He looked at my legs and feet. He didn't make any test of any nature at all.

Q. He made a visual inspection, did he? [97]

A. Yes, sir.

Q. Had you take off your shoes and your pants?

A. Yes, sir.

Q. He examined your legs and your feet?

A. He looked at 'em, yes, sir.

Q. Felt them?

A. No, sir.

Q. And he gave you no treatment?

A. No treatment.

Q. I think you said that he said that there was nothing he could do for you?

A. Right.

(Testimony of Hufford Donald Maynard.)

Q. Now you say Dr. Conwell. What treatment did Dr. Conwell give you?

A. I asked him was there anything that he could do and he said no, there——

Q. Just a moment, please. Don't testify as to what he said. I asked you what treatment he gave you.

A. None.

Q. And he is located where?

A. In Birmingham, Alabama.

Q. You saw him when, Mr. Maynard?

A. In July or August of '56.

Q. That would be less than a year ago?

A. Yes, sir. [98]

Q. And did you go to him for treatment or because a lawyer down in Alabama took you to him?

A. Because a lawyer took me to him.

Q. What is his field of medicine, if you know, Mr. Maynard?

A. I don't know.

Q. He's a orthopedic man, is he not, or do you know that?

A. I don't know.

Q. Did you see him more than on just the one occasion?

A. One time.

Q. Now, what tests did Dr. Conwell give you, by the way?

A. Pardon.

Q. What tests did Dr. Conwell give you?

A. I don't know whether—he took X-rays, the blood pressure——

Q. He took X-rays?

A. Yes, sir. He put the blood pressure thing around my legs and he used his stethoscope to listen for pulse beat and felt with his hands.

(Testimony of Hufford Donald Maynard.)

Q. He's not a doctor you had ever seen before that occasion, I take it? A. Pardon?

Q. He is not a doctor who had ever treated you or cared for you at any time before that one occasion last June or July? A. No, sir. [99]

Q. And he has never seen you since?

A. No, sir.

Q. Now, since you have been here in Seattle the last week or ten days you have been examined by a Dr Sheridan on our behalf, have you not?

A. Yes, sir.

Q. What other doctors have you seen in Seattle, sir? A. I saw Dr. Crystal.

Q. That's Dr. Dean Crystal?

A. Yes, sir.

Q. Yes, sir. A. I've seen Dr. Ruuska.

Q. How do you spell his name?

A. R-u-u-s-k-a. And another doctor, but I can't remember his name right at the present time.

Q. Where is he located?

A. In the Medical-Dental Building down here.

Q. Did each one of them examine you?

A. Yes, sir.

Q. Would the third doctor whose name you have forgotten be Dr. Seering?

A. Yes, sir.

Q. Mr. Riley has just suggested that it is.

A. Yes, sir.

Q. All three then have examined you within the past week [100] or two? A. Yes, sir.

Q. In addition to Dr. Sherman?

(Testimony of Hufford Donald Maynard.)

A. Yes, sir.

Q. Sheridan, excuse me. A. Sheridan.

Mr. Karr: Your Honor, I have practically concluded my examination except that I have here some photostats which I have not previously seen. They have been in the Clerk's custody and perhaps I should have seen them, but I haven't, which I would like to look at for just a little while. They are so small they are a little hard for me to read. Am I a little too early for the afternoon recess?

The Court: No, the Court can have it now, but I ask you during that time to consider not only what you have just mentioned but also what further consideration you wish to give to the question of whether you will, when your cross examination of this witness is finished, proceed with whatever questions on direct examination you may wish to ask this witness as a part of the defendant's case in chief done out of order in order to accommodate this witness, which the Court now is very much inclined to direct be done.

Mr. Karr: Thank you, Your Honor. [101]

The Court: Court will be at recess for ten minutes.

(Short recess.)

The Court: All are present. You may proceed.

Q. (By Mr. Karr): Mr. Maynard, you referred to three doctors whom you have seen since you've been here in Seattle. Was Dr. Crystal the first one you went to? A. No, sir.

Q. Who was the first one you saw?

(Testimony of Hufford Donald Maynard.)

A. Dr. Ruuska.

Q. Ruuska?

A. Ruuska—or excuse me; your doctor.

Q. I see, was the first one, that was Sheridan?

A. Yes, sir.

Q. Then you went to see Dr. Ruuska?

A. Yes, sir.

Q. That was not on our behalf?

A. No, sir.

Q. Mr. Riley sent you to him?

A. Yes, sir.

Q. And after seeing Dr. Ruuska did he send you to Dr. Crystal? A. Yes, sir.

Q. Dr. Ruuska did? [102]

A. Yes, sir.

Q. They don't practice together?

A. No, sir.

Q. And then you saw Dr. Crystal, then who sent you to Dr. Seering?

A. Mr. Riley—no, Mr.—what was the question now again?

Q. Who sent you to Dr. Seering?

A. Mr. Riley.

Q. I see. Now referring, Mr. Maynard, to your medical record during the period of your service with the U. S. Air Force, and particularly to your medical history taken January 26, 1953, I call your attention to the date because it's a year following the accident, do you recall a medical examination while you were still in the Air Force at that time?

A. January when?

(Testimony of Hufford Donald Maynard.)

Q. 26th, 1953.

A. No, sir, I don't remember it.

Q. Where were you stationed in January of '53?

A. Montgomery, Alabama, I believe it was.

Q. I see, and do you recall that there was a medical examination at the time you left the Air Force or at about that time?

A. Yes. They were—I remember something about a medical examination, but I don't remember too much about it. [103]

Q. I see. Well, in that examination, Mr. Maynard, I'll ask you if you remember this examination a year after the accident, if they didn't ask you details about any physical disabilities you had. Do you remember anything about that at all?

A. I remember a form that they had that asked you did you have any specific types of illnesses and so forth.

Q. They go through a list of some fifty or sixty of them actually, don't they?

A. They don't go through it, no, sir. They give you a slip and——

Q. Oh, they give it to you and you check it off, is that right? A. Yes, sir.

Q. And you were given such a list at the time of the medical examination I'm talking about in January of '53, were you not, sir?

A. Yes, sir.

Q. And included in that list you checked off the fact that you had had the mumps and the

(Testimony of Hufford Donald Maynard.)

whooping cough and appendicitis, did you not?

A. Yes, sir.

Q. You were checking anything that you had had difficulty with, were you not, and those three you checked as something you had suffered from?

A. Yes, sir.

Q. In the list was the item of lameness and you checked that as not ever having had any trouble of that kind, did you not?

A. No lameness, no, sir.

Q. Well, you checked that as "No". They also included in the list that you checked either yes or no the item of foot trouble, and you said you had never had any foot trouble, did you not, sir?

A. Yes, sir.

Q. In addition to the list there was a series of questions that you answered yes or no, was there not? A. I don't actually remember it.

Q. Well, would this help to refresh your recollection: Was there not on the second page or the reverse side of the page——

Mr. Riley: I'm going to object at this point, Your Honor. I think Counsel should give the witness a copy of this thing and let him see it.

The Court: The objection is overruled.

Q. (By Mr. Karr): On the second page or reverse side of the first page of this medical examination, Mr. Maynard, were you not asked the question: "Have you had any illness or injury other than those already noted?" and you answered, "No", did you not, sir? [105]

(Testimony of Hufford Donald Maynard.)

A. I don't know what I answered. It's been too long ago.

Q. Did you not have this question asked you a year after the accident in January of '53: "Have you consulted or been treated by clinics, physicians, healers or other practitioners within the past five years?" and you answered, "Yes, tonsils in 1930 and appendix 1949." Wasn't that what you answered? A. Yes, sir.

Q. You didn't say anything about having had any treatment for leg or foot trouble a year before?

A. I didn't have any treatment for it a year before.

Q. I thought there was a doctor at Sandspit and another at McChord.

A. Not treatment for legs, no, sir.

Q. You were asked this question, were you not: "Have you treated yourself for illness other than minor colds?" and you answered, "No", did you not? A. Yes, sir.

Q. And you say you do not recall the question, "Have you had any illness or injury other than those already noted?" and you answered, "No", to that a year after the accident, did you not?

A. I don't recall the questions that were on the form. I remember filling out the form.

Q. You do recall in filling out the form you did not say [106] that you had had any injury in an accident a year before, did you? A year after

(Testimony of Hufford Donald Maynard.)

the accident you didn't say anything about having been injured?

A. I don't think I did. I don't remember.

Q. And at that time you hadn't brought a lawsuit either, had you, Mr. Maynard? You did that afterwards? A. Yes, sir.

Mr. Karr: Could this be marked for identification, Your Honor.

The Clerk: Defendant's Exhibit No. A-16.

(A photostatic copy of order was marked Defendant's Exhibit No. A-16 for identification.)

Q. (By Mr. Karr): Mr. Maynard, would you be good enough to take a look at what has been marked Exhibit A-16 and tell us whether or not that is not a photostatic copy of the order on which you came home from Japan on the flight in which the accident occurred? A. Yes, sir.

Mr. Karr: We offer it in evidence, Your Honor.

The Court: Admitted.

(Defendant's Exhibit No. A-16 for identification was admitted in evidence.)

Mr. Karr: May it please the Court, I have here a complete set of Mr. Maynard's medical service [107] record during the period of his Air Force enlistment. It was sent to us under the seal of the U. S. Army and it is a photostat, white on black. I understand that is not acceptable in this court, but I wonder if I——

(Testimony of Hufford Donald Maynard.)

cited an example where your testimony given to him in your deposition in his offices on March 7th pursuant to our agreement with him was in conflict with what you said this morning, and you stated in the deposition that your feet were discolored and you stated this morning that they were swollen and that they were discolored, but in the deposition you stated that they were discolored a little bit. Now would you tell the Court whether or not they were discolored and, if so, how they were discolored? [110]

Mr. Karr: May I have the citation in the deposition from which you are reading?

Mr. Riley: Page 25. I didn't read it.

A. They were swollen and they were discolored. I was belittling myself when I said what I did in the deposition, but as to exactly what extent they were swollen I couldn't say, only I know that they were swollen and I know that they bothered me, and that's all I can say.

Q. (By Mr. Riley): All right. While you were home at Alabama on your emergency leave you stated on cross examination that you had had no medical attention. Now, was there a reason why?

A. Yes.

Q. Would you state what it was?

A. Because I didn't figure that there was anything serious wrong with me, just that they were frostbitten from the cold water, and I figured that it would eventually go away and wouldn't bother me no more.

(Testimony of Hufford Donald Maynard.)

Q. At the time you went into the Marines do you have any reason why you did not tell them about your legs and feet? A. Yes.

Q. Would you state what reason you had?

A. Because at that particular time I was out of a job and [111] jobs were pretty hard to get, and I knew if I tried to go into the military service and I told them that I was bothered with my feet and legs, then they wouldn't more than likely ever have taken me in, and I needed some type of employment.

Q. You stated that when you entered the Marines that you were unable to pass the S portion, the psychiatric portion, of the pulhes test, and would you state why you were unable to pass that, what your trouble was?

A. That was because normally when I start talking about this accident I get emotionally excited and shook up and they thought I was a risk, possibly, from that.

Q. During your duty in Japan in the Marine Corps you stated that you didn't miss any ordinary duties. Did you ask for releases?

A. I asked for a release, yes.

Q. What happened?

A. They wouldn't release you from their hikes or field problems unless you had a medical excuse. They would tell you to stick it out, become a man with the Marine Corps, or something to that effect, the propaganda they have.

Q. Now, were you or were you not having

(Testimony of Hufford Donald Maynard.)

trouble with your legs during your service in the Marine Corps? A. Yes, I was. [112]

Q. In response to other questions, do you have any reason why you never quit work previous to the time you went back into the Marine Corps or at any time that—in other words, do you have any reason—you have stated that while you were working you were having difficulty with your legs in one particular job or another. Is there any reason why you didn't quit work because your legs were bothering you? A. Yes.

Q. And what is it?

A. Because if I was to quit work just because the legs were bothering me, how could I live? You've got to work to live.

Mr. Riley: I believe that's all.

Mr. Karr: Just a couple of questions, Your Honor, of Mr. Maynard.

The Court: You may do so.

Recross Examination

Q. (By Mr. Karr): As I understood you just now, you told Mr. Riley that the reason you didn't tell the U. S. Marine Corps that you had had any trouble with your feet or legs was because you wanted to get into the Marines.

A. Not specifically the Marine Corps, but in the service, [113] yes, sir.

Q. The service; and that jobs were scarce?

A. Yes, sir.

(Testimony of Hufford Donald Maynard.)

Q. But this was in June and July of '54, wasn't it, sir?

A. That I went in the Marine Corps?

Q. Yes. A. Yes.

Q. Jobs weren't very scarce then, were they?

A. Yes, they were, for my—I didn't have any skill or trade. I—

Q. How long were you out of work from the time you left Ford until you got into the Marines?

A. A couple of weeks.

Q. And that wasn't the reason that you told the Air Force in January of '53 that you hadn't had any injuries, was it, Mr. Maynard?

A. No, sir.

Q. You didn't have that explanation for telling them that then?

A. Not that particular one, no, sir.

Mr. Karr: That's all.

The Court: You may step down.

Mr. Riley: I renew my request, if Your Honor please, that this witness be excused at this time for the reasons previously stated. [114]

(There was a discussion with reference to excusing the witness.)

(The witness was excused from the witness stand.)

Mr. Riley: I'm ready to call Mr. Peterson at this time.

The Court: Let him come forward and be sworn as a witness. Can Counsel stipulate agreeably to themselves what is the correct corporate name of

this defendant? Sometimes it is named by one name and sometimes by another.

Mr. Karr: Well, Mr. Peterson will know.

ARTHUR T. PETERSON

called as a witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riley): Mr. Peterson, would you state your full name for the record, sir?

A. Arthur T. Peterson.

Q. Where do you reside?

A. 1347 Southwest 175th, Seattle, Washington.

Q. Where are you employed, sir?

A. At Seattle-Tacoma Airport by Northwest Orient Airlines. [115]

Q. What is the correct name of the corporate body by which you are employed?

A. Northwest Orient Airlines.

The Court: Let the record show that.

Q. (By Mr. Riley): Is Northwest Orient Airlines and Northwest Airlines, Incorporated, one and the same?

A. To my knowledge, yes.

Q. They are not——

The Court: Do you mean by that so far as you know? A. Yes.

The Court: Or do you mean to say that you are absolutely certain that the affirmative is the answer to that question?

A. Well, let's put it this way: The name at one

(Testimony of Arthur T. Peterson.)

time was called Northwest Airlines, Incorporated. Today it is Northwest Orient Airlines.

The Court: Without the "Inc." or any other word, is that right?

A. That is correct.

The Court: You may proceed, Mr. Riley.

Q. (By Mr. Riley): What is your capacity at Northwest Orient Airlines, Mr. Peterson?

A. Manager of Northwest Airlines operations in the western region. [116]

Q. And what area is encompassed within the western region?

A. From Billings, Montana, to Seattle, to Honolulu, from Seattle to Anchorage to Shemya.

Q. How long have you been manager for operations for the western region?

A. Approximately four and a half years.

The Court: Four and a half?

A. That's correct.

Q. (By Mr. Riley): Who was your predecessor?

A. Mr. F. C. Judd.

Q. And where is he now?

A. St. Paul, Minnesota.

Q. And what is his title now?

A. Vice President in charge of operations.

Q. He is employed by Northwest Orient Airlines? A. Yes, sir.

Q. Do you know whether or not Mr. Judd was the operations manager for the airline, for the defendant airline, for the western region during January, 1952? A. Yes, he was.

(Testimony of Arthur T. Peterson.)

The Court: May I ask you, is there any other person named Judd known to you to have been during the last ten or fifteen years in an important official corporate capacity connected with the defendant's business? [117]

A. I don't quite understand you there. I——

The Court: Do you know as one having ever been connected in a prominent way with the corporate affairs of this defendant corporation other than this man Judd having the family name of Judd?

A. Not to my knowledge.

The Court: Is this the only man by the name of Judd who has had an important connection with it as a corporate officer?

A. He's the only one I know of.

The Court: You may proceed.

Q. (By Mr. Riley): Just what is your capacity, then? You have described it as manager of operations of the western region. Would you state what your duties and responsibilities are?

A. In brief, in charge of ship movements, personnel and stations in the various regions.

Q. Do you have a certain number of aircraft committed to your control?

A. No.

Q. How are the aircraft controlled in your region?

A. They are controlled by what we call ship routing out of St. Paul, Minnesota.

Q. Do you have particular aircraft based at any point in your system within the western region?

A. Not any specific aircraft. It might be

(Testimony of Arthur T. Peterson.)

wherever they might wind up on the particular end of their route.

Q. In your organization can you state who would be in charge in the western region or who would have been in charge in the western region in January, 1952, of the defendant company of the inspection of safety equipment in aircraft leaving from or arriving at the Seattle-Tacoma base for your airline?

A. We have inspectors at the Seattle-Tacoma Airport and inspections are performed due to so many hours that's been piled up on the airplane at its regular inspection periods.

Q. Could you state who in January, 1952, was in charge of the inspection of safety equipment at Seattle-Tacoma Airport?

A. Of safety equipment only?

Q. Yes.

A. At that time I believe it was Mr. Ed Pitcher.

Q. And what is Mr. Pitcher's title?

A. Well, let me correct that statement. Maybe that should be Mr. Ophsahl, Elvin Ophsahl.

Q. All right. What is Mr. Ophsahl's title?

A. Inspector in charge at the Seattle station.

Q. Are there in the Northwest Airlines procedures a fixed period of time during which or after the expiration of [119] which you are required to effectuate an inspection of the safety equipment installed in any particular aircraft?

A. Yes, sir.

(Testimony of Arthur T. Peterson.)

Q. Do you know what the standard is?

A. Offhand I can't answer that.

Q. Well, do you have any idea what it is?

A. Well, after so many hours or after each trip, but I'm not positive on that.

Q. Do they inspect it just for placement to see if it's there or do they actually have tests to see that it's working?

A. They test to see that it's properly working. Now, whether that's after——

Q. Who would be in charge of your maintenance at your Seattle base in the western region—correction, at the Seattle base?

A. Ed Matthews.

Q. Was he in charge in January of 1952?

A. Yes, sir.

Q. Would you tell me about the functions of a flight superintendent or a flight controller?

A. The functions of him?

Q. Yes, sir.

A. In clearing flights from one point to another under [120] the regulations of the CAA and company regulations.

Q. In the event of a three-engine operation and engine out operation are there any particular promulgated regulations in your airline which place a particular or peculiar burden upon the flight controller on duty at that particular time?

A. No. At—in 1952 or at the present time are you speaking of?

Q. Well, I'll say in 1952.

(Testimony of Arthur T. Peterson.)

A. Well, there has been some change in that regulation. In 1952 a pilot was to land at the next scheduled field. Today a pilot can proceed to wherever he thinks is the safest operation. He don't have to land at the particular next airport because of three-engine operation.

Q. What is a scheduled field?

A. Pardon?

Q. What is a scheduled field?

A. Well, when I said "scheduled", a field that is called as an emergency field along our route.

Q. In fact, in 1952 wasn't the air controller or flight superintendent supposed to consult with and advise the pilot as to the nature of the emergency, the point of intended landing or proposed landing and such things as that? [121]

A. In a case of that nature at that time, as I recall the regulation the pilot was to land at the next appropriate airport, which I believe he done at that time.

Q. I understood you to say that a scheduled field is an emergency field.

A. No, I didn't say that. If I did, I didn't mean it.

Q. You stated that a pilot could proceed in a three-engine operation without further clearance to a scheduled field.

A. Well, to any airport that he felt was a safe operation.

Q. To any airport that he felt was a safe operation. Is that an emergency field or isn't it?

(Testimony of Arthur T. Peterson.)

A. It could be either.

Q. Is that included in an emergency field?

A. It could be either.

Q. It could be either. Under ordinary circumstances even in 1952 would it not be the better practice and isn't it a fact that flight controllers or air controllers would communicate with the pilot to determine the nature of the emergency to consider various alternative points of landing?

Mr. Koch: Your Honor, that question is very leading. [122]

The Court: The objection is overruled.

Mr. Riley: I'll ask the reporter to read the last question.

The Court: Very well.

(The reporter read the last question.)

Q. (By Mr. Riley): Do you understand the question, sir?

A. Yes, but he necessarily maybe wouldn't wait for the dispatcher's decision because at that time I believe it was already spelled out in the CAA regulations that he must land at the next field.

Q. Are you testifying that he must land at the next field?

A. I believe that's what the regulations called for.

The Court: Now, Counsel, there has come up the objection as leading. You have called this witness in the status of a plaintiffs' witness, and in that status you are not entitled to cross examine him. You may proceed.

(Testimony of Arthur T. Peterson.)

Mr. Riley: I appreciate that, your Honor. Of course, he is a principal employee of the defendant corporation and I'm considering him as an adverse witness.

The Court: You have called him as Plaintiffs' witness and that is his status, which does not entitle you to cross examine him.

Mr. Riley: Will your Honor bear with me [123] for a moment? I was looking for a document.

The Court: Yes.

(Brief pause.)

Mr. Riley: Well, I'll pass it for a moment.

Q. (By Mr. Riley): Mr. Peterson, does your company currently operate leased aircraft?

A. Do they currently operate?

Q. Yes.

Mr. Koch: I object to that, your Honor. I can't see the relevancy of that inquiry at this point.

The Court: The objection is overruled.

Q. (By Mr. Riley): You may answer.

The Court: I wish Counsel would make sure where the co-counsel and associate counsel are attending the trial that you make a definite arrangement between you that if one of the Counsel wishes to handle the witness in so far as his side's examination is concerned in any part the Court directs that the arrangement be made for him to handle it in all parts, stating objections as well as asking questions.

You may proceed.

It is quite agreeable to the Court for either Coun-

(Testimony of Arthur T. Peterson.)

sel to interrogate the witness or to take over the work in connection with any one witness, but [124] I wish the same Counsel to do all of it.

You may proceed.

Mr. Riley: Would you repeat the last question, Mr. Reporter.

(The reporter read the question as follows: "Mr. Peterson, does you company currently operate leased aircraft?")

A. I can't answer you that question.

Q. (By Mr. Riley): You have had experience in operating leased aircraft?

The Court: Your question should be more specific.

Q. (By Mr. Riley): Have you had experience in leasing aircraft from other airlines?

A. I personally haven't had experience in leased——

The Court: You used the word "you".

Q. (By Mr. Riley): Has the airline during the time you have been operations manager for the western region leased aircraft and operated them from the Seattle base?

A. I believe they have.

Q. Do you know whether or not the airline has any procedure for standardizing the configuration of leased aircraft with those already in the [125] Northwest Airlines system? A. Yes, they do.

Q. And do they do that?

A. You mean make some changes in the config-

(Testimony of Arthur T. Peterson.)

uration of the airplane to comply with the present airplanes that they might own at that time?

Q. Yes, sir.

A. They do make some changes, yes, and things of important nature they would bulletin the personnel accordingly.

The Court: Would not this be a good point to let the witness explain in the record the meaning of that phrase? It seems to be a word of magic in this connection, possibly.

Q. (By Mr. Riley): When I use the term "aircraft configuration" do you understand what I mean, Mr. Peterson?

A. Well, I presume that you mean, oh, an instrument or the way a certain thing operates in the airplane that might be different from our present fleet that we're operating that's owned by Northwest Airlines.

Q. Yes. In this regard would the procedure which you have just mentioned provide for the inspection of the cabin areas, interior areas, to see that the seating arrangements and the placement of [126] life vests and life jackets and life rafts are in the spaces, similar spaces as your regular fleet of aircraft?

A. They would be in the same place or a bulletin informing the people where they are located.

Q. Under ordinary circumstances then this would be accomplished?

A. Under any circumstance.

The Court: What is there, if anything, about

(Testimony of Arthur T. Peterson.)

those words and about that explanation you have made or as stated in Counsel's question which is that situation of configuration referred to by you?

A. Well, in some airplanes——

The Court: No, those words, those phrases that were in that explanation in answer to the last question.

A. Riley was talking about—Mr. Riley was talking about the cabin and I was talking about the cockpit.

The Court: Where does this configuration fit in and what does it mean to you? You define it. Tell us what you understand is meant properly by the use of that word.

A. Well, I would say the cabin, the interior, the seats arrangement, where the equipment is in the cabin of the airplane. I think that's what Mr. [127] Riley is referring to.

The Court: What do you refer to when you use the term "configuration" in this trade?

A. That's what I was referring to.

The Court: You may proceed.

Q. (By Mr. Riley): Mr. Peterson, would you tell us what arrangements and what procedures are used by Northwest Orient Airlines for controlling aircraft engine time and aircraft flight time in order to assure that the particular engine components and the engine and the airframe do not exceed the maximum permissible times permitted by Civil Aeronautics regulations?

(Testimony of Arthur T. Peterson.)

A. That is all handled by our office called Ship Routing in St. Paul.

Q. Would you describe in general how the times are accumulated and recorded?

A. From the log book, the hours that the airplane has flown is sent in to St. Paul and kept a daily tally on the airplane and various engines, and so forth, that tallies are kept on.

Q. How are you to know here whether or not an aircraft has exceeded the time permitted for flight?

A. Has exceeded?

Q. Yes, if it has.

A. Ship Routing is the one that routes the [128] airplane and that controls the hours of the airplane.

Q. Are you advised by them——

A. I'm not advised. They——

Q. I mean by "you", is the station here at Seattle advised? A. Yes.

Q. So that officially or unofficially one of your juniors or one inferior to you is advised; one who is responsible to you, I should say, is advised, presumably?

Mr. Koch: I object to the form of the question, your Honor. If he's asking for information he shouldn't be telling the witness what to say yes to.

The Court: The objection is sustained. State a clear question.

Q. (By Mr. Riley): Just tell us, Mr. Peterson, by what method or to whom is the information relating to the flight time of a particular aircraft and its engines forwarded here to Seattle.

(Testimony of Arthur T. Peterson.)

A. It's forwarded to the flight dispatcher office and the maintenance to Mr. Matthews' office.

Q. Is the Seattle station equipped to make engine changes and major repairs on aircraft?

A. Yes, sir.

Q. Is this a common occurrence, engine changes?

A. Yes. [129]

Q. If an engine is received—are all of your engines overhauled in your own system? By using the second person I mean Northwest Airlines, of course.

A. Yes.

Q. In the case of a leased aircraft or a leased engine or an engine overhauled by an agency other than Northwest Airlines and received by your station here, what means are taken to ascertain the amount of flight time on that particular engine?

A. That would come through our Ship Routing out of St. Paul.

Q. If an engine after top overhaul was shipped to you, for instance, from Transworld Airlines, to whom would the advice of the remaining engine time or the existing engine time be forwarded?

A. I assume that it would have come through the same pattern as it does today, but I can't answer you that because I had nothing to do with it.

Mr. Riley: I would like to have this marked for identification.

The Court: It may be so marked.

The Clerk: Plaintiffs' Exhibit No. 12.

(A portion of Northwest Orient Airlines op-

(Testimony of Arthur T. Peterson.)

erations manual was marked Plaintiffs' Exhibit No. 12 for identification.) [130]

The Court: Does that paper have a name, Mr. Peterson?

A. It's a——

The Court: Can you describe it with a one word name?

A. It's a mechanical reference from the Mechanical Division.

The Court: Do Counsel know a name that fairly reflects the nature of the information contained in the document?

Mr. Riley: Yes, your Honor. This is taken from the Northwest Airlines manual.

The Court: I do not know whether it was or not, but what kind of a thing is it as characterizing the kind of information in it?

Mr. Riley: It describes——

The Court: What is it? Give it a name.

Mr. Riley: It is a portion of the Northwest Airlines operations manual and it refers particularly to the cabin configuration of DC-4 type aircraft, and the manual——

The Court: You may proceed. I thought there would be a one word name. Proceed. Ask the witness.

Q. (By Mr. Riley): The document handed to you marked Plaintiffs' Exhibit 12, Mr. Peterson, [131] can you tell the Court what that consists of?

A. Well, the subject on this sheet is Emergency and Special Equipment.

(Testimony of Arthur T. Peterson.)

Q. Do the diagrams there—let me ask you this first of all: Does the Northwest Airlines operations manual provide in it the configuration and relating particularly to DC-4 type aircraft, does it provide the configuration for the cabin interiors of DC-4's with relation to the location of lifesaving equipment and survival equipment? A. Yes.

Mr. Koch: Your Honor, I—

Q. (By Mr. Riley): Does that portion which you have before you contain that information?

Mr. Koch: Before the witness answers, your Honor, I would object to questions relating to the contents of an exhibit that is not in evidence.

The Court: The objection is overruled. The Court understands the question to relate to the character of the information in it rather than to state what it is, and that is the reason for the Court's ruling. Do not give the information which is stated in the exhibit. It is only permissible for Counsel to inquire and for you to answer what kind of information is in it. Proceed, Mr. Riley, by asking proper questions. [132]

Q. (By Mr. Riley): Mr. Peterson, does that portion of the manual before you provide the configuration of DC-4 type aircraft in Northwest Airlines operations for the placement of seats, life rafts and life vests?

A. It does at this particular time, but its outlined of May 16, 1951.

Q. That was effective on May 16, 1951?

A. That is true.

(Testimony of Arthur T. Peterson.)

Q. Yes. A. In this particular aircraft.

Q. Very well.

Mr. Riley: I wish to offer the exhibit in evidence, if the Court please, and before taking it from Mr. Peterson I would like to ask him some further questions relating to the exhibit.

Mr. Koch: Your Honor, I have no objection to the exhibit as such but I question, in view of the fact that this witness has testified that he is in the operations division, that an exhibit relating to inspection and maintenance is properly within his knowledge, and that question hasn't been asked, if he is familiar with it.

The Court: The objection is overruled. Plaintiffs' Exhibit 12 is admitted. [133]

(Plaintiffs' Exhibit No. 12 for identification was admitted in evidence.)

Q. (By Mr. Riley): Now referring to Plaintiffs' Exhibit 12, Mr. Peterson, will you tell me where in the aircraft cabin in DC-4 type aircraft life rafts are supposed to be stowed in your system, in Northwest Airlines system?

A. Well, the only thing that I can tell you is what I could read from this.

Q. Yes, sir, I understand.

The Court: Do not do that.

Mr. Riley: I wish to ask——

The Court: He cannot read the contents of the exhibit unless you ask him to read the exhibit. It being admitted, you may ask him to read it or some part of it.

(Testimony of Arthur T. Peterson.)

Mr. Riley: Yes, your Honor. He has to interpret——

The Court: If he does otherwise, he is testifying twice. If you wish him to read some part of it, direct his attention to what part and proceed in that manner.

Mr. Riley: It's a diagram, your Honor, and I believe he has to interpret it. That was my problem in phrasing that question. [134]

Q. (By Mr. Riley): Would you read the diagram please, Mr. Peterson, and tell us where it states the life rafts should be stowed in a DC-4 type cabin?

A. May I ask you a question? Why can't this question be asked of people that are fully familiar with this?

The Court: That question is not in order, Mr. Peterson, and Counsel may proceed to interrogate the witness.

Mr. Riley: Would you repeat the last question please, Mr. Reporter.

(The reporter read the last question.)

The Court: Do you want him to state the place on the physical thing where you can look and see or where anyone else can look and see these statements you mentioned, is that what you are asking the witness to do?

Mr. Riley: I'm asking him to read the diagram, if your Honor please, and read what it says as to the placement of the rafts.

(Testimony of Arthur T. Peterson.)

The Court: If that is what you mean, so word your question and let the witness proceed.

A. Well, to start with, in the forward part of the airplane, according to this diagram, the cabin attendants' life vests are under their seats. The ditching rope——

The Court: The ditching what? [135]

A. Rope, r-o-p-e, is in the door entrance of the airplane. The life rafts or overland survival kit is forward of the passenger entrance door. The passenger life vests, two in a rack, are stored over each double seat in the airplane. The crew's life vests are stored in back of the crew, according to this diagram, and there is also a ditching rope in back of the crew cockpit.

Q. (By Mr. Riley): All right. Does Exhibit 12—would you read Exhibit 12 and read the parts which indicate the effective date of that order and when, if it shows it was superceded or cancelled?

A. This bulletin was issued effective September 11, 1951, and superceded May 16, 1951. It was effective September 11, 1951, and it was superceded May 16, 1951.

Q. Well, if it was effective September 11, 1951, how could it have been superceded May 16, 1951?

A. I'm reading what it states here. It was issued effective at once September 11, 1951, and it says, "Superceded May 16, 1951."

Q. Would you look at the rest of the document and see if there are any other markings as to the effective date, in the front of the document?

(Testimony of Arthur T. Peterson.)

A. The front of the document here on Page 1 it says, "Issued effective December 7, 1951."

Q. Is it marked as having been superceded?

A. "Superceded October 18, 1951." What I was reading before was from Page 7. This is Page 1.

Q. Yes, sir. Do you know what that means, how it could — do you know what it means or how it could possibly be superceded by an earlier date when it was effective at a later date?

A. All I know is what it says. It could be a typographical error.

Q. All right.

The Court: Is there anything on that document to indicate what part of it was in effect, if any was in effect, on the day of this accident?

A. Which was in effect the day of the accident?

The Court: Yes. Look the entire exhibit over throughout the several pages. The date of the accident is said to be January 19, 1952.

A. Well, there's nothing in here that I can see except that it was superceded on this particular page, on Page 7, May 16, 1951, and there must be a later issue for the manual than what this sheet calls for.

Q. (By Mr. Riley): Now you're reading "superceded". Isn't that in fact "supercedes"?

A. Or "supercedes", yes. [137]

Q. "Supercedes", isn't that right? A. Yes.

Q. It doesn't mean that this particular document was superceded on an earlier date then, does it?

(Testimony of Arthur T. Peterson.)

A. That is correct. It was issued and supercedes May 15, 1951. So this would be in effect.

Q. I see. Very well.

The Court: On what date?

A. May 16, 1951.

The Court: State, if you know, was that in effect on January 19, 1952?

A. I assume that this was in effect at that time.

Mr. Riley: I have no further questions from Mr. Peterson.

The Court: May I suggest to defendant's Counsel that if you intend to call this witness as a defendant's witness, won't you please have that in mind in determining what and how many questions you may ask him now on cross examination?

Mr. Koch: Yes, your Honor.

The Court: You have the right to ask him about anything about which he has been questioned by Mr. Riley, of course, but even though you do have that right, have in mind this other consideration which I ask you to consider. [138]

Cross Examination

Q. (By Mr. Koch): Mr. Peterson, as manager of operations does the inspection of emergency gear and equipment and the location of that gear and equipment in the aircraft fall within your area of control? A. No.

Q. Is Mr. Ophsahl, who you testified was the inspector in charge of safety equipment an em-

(Testimony of Arthur T. Peterson.)

ployee who is one of your subordinates, is he in your department?

A. He comes under the operations department, yes.

Q. Does Mr. Matthews, too? A. Yes, sir.

Q. What does the operations department encompass in Northwest Orient Airlines in Seattle? Is everything at Seattle-Tacoma air base of Northwest Airlines under your control?

A. At the airport.

Q. At the airport? A. Yes.

Q. Do you have personal familiarity with the inspection procedures? A. Somewhat. [139]

Q. Are you familiar with the general location of emergency gear in DC-4 planes apart from your examination of Plaintiffs' Exhibit 12?

A. Somewhat.

Q. Are you generally familiar with the maintenance procedures that occur in connection with overhauling and maintaining aircraft at the Seattle-Tacoma base of Northwest?

A. That isn't my responsibility, but I'm acquainted with some of it.

Q. You have a general knowledge of it?

A. That is right.

Mr. Koch: May I see Plaintiffs' Exhibit 12 please?

The Court: You may.

(The exhibit was handed to Mr. Koch.)

Q. (By Mr. Koch): Are the specific procedures that a pilot is required by company regulations

(Testimony of Arthur T. Peterson.)

and Civil Aeronautics Administration regulations to take in the event of a three-engine operation on a four-engine aircraft matters within your area of control and supervision?

A. Are you speaking of today or of 1952?

Q. I'm speaking of January 19, 1952.

A. I can't answer you that. [140]

Q. I'm referring to the questions that plaintiffs' Counsel asked you relating to steps to be taken by the pilot in landing in emergency or other airfield facilities when he lost one of his engines and landed as he did in this case, and you were testifying with regard to emergency airfields and suitable facilities, and I wondered if this was something of which you had general knowledge or were quite conversant.

A. Well, as I say, it depends what dispatch, weather conditions that they might be operating under at the present time, where the pilot and the dispatcher decides which is the most safe operation, whether he proceeds to the next airport or he continues to Seattle, Washington.

Mr. Koch: I have no further questions.

The Court: Anything further of this witness?

Mr. Riley: No, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Riley: Call Mr. Pitcher.

The Court: Mr. Pitcher, please come forward and be sworn. [141]

EDWARD K. PITCHER

called as a witness by plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riley): Mr. Pitcher, would you state your full name for the record, please?

A. Edward K. Pitcher.

The Court: J.? A. K.

Q. (By Mr. Riley): And where do you reside, sir? A. 1627 South 158th, Seattle.

Q. By whom are you employed?

A. Northwest Airlines.

Q. What is your capacity there, sir?

A. Supervisor of equipment service.

The Court: Equipment and service, or——

A. Supervisor of equipment service.

Q. (By Mr. Riley): What are your duties as supervisor of equipment service?

A. I have charge of the loading, the ground service of the aircraft, such as cleaning and supplying.

Q. And with what do you supply the aircraft?

A. With all the items necessary for the flight, for the stewardess and passenger comfort. [142]

Q. All right. What are all the items necessary for flight in a particular aircraft?

A. That's about everything from safety pins to towels.

Q. Would that include ditching folders in the aircraft?

A. That would include the literature, yes.

(Testimony of Edward K. Pitcher.)

Q. Were you in this capacity in January of 1952? A. I was.

Q. Are you familiar with the crash of Flight 324 of Northwest Airlines on January 19, 1952?

A. Yes.

Q. Do you know whether or not that aircraft was supplied with ditching folders when it left Seattle for its trip to Japan and back?

A. It was.

Q. Was the aircraft supplied in Seattle with ditching folders for a round trip?

A. It normally would be supplied for a round trip, yes, sir.

Q. That would be normal procedure?

A. Yes, sir.

Q. And do you know whether or not it was?

A. I didn't personally check the airplane, but I believe it was.

Q. Did you investigate later to ascertain whether or not it was? [143] A. I did.

Q. And did you ascertain that it had been?

A. Yes, it was.

Q. How did you ascertain that?

A. I checked with the crew that had worked on the airplane.

Q. Who was that crew?

A. I don't recall the shift at the time, but the crew chief, the equipment service chief was Mr. Wean.

Q. Do you know what Mr. Wean's full name—do you know Mr. Wean's full name?

(Testimony of Edward K. Pitcher.)

A. I believe it was Bert Wean.

The Court: How do you spell the surname of that man?

A. W-e-a-n.

Q. (By Mr. Riley): Does he still work for the airline? A. No, sir, he does not.

Q. Do you know where he is now?

A. I do not.

Q. Do you know when he quit working for the airline?

Q. No, I couldn't give a definite date. It seems to be three——

Q. Do you know why he quit working for the airline? A. Three or four years.

Q. Do you know why——

A. He wasn't under my supervision at the [144] time he terminated. I don't know the exact reason on that.

Q. Do you know what difficulties he had, if any, when working for the company?

Mr. Koch: I object, your Honor, as completely irrelevant to the issues in this case.

The Court: The objection is overruled.

Mr. Koch: What was the last question, Mr. Reporter?

The Court: Read it.

(The reporter read the last question.)

Mr. Koch: The witness has already said that he wasn't under—this man wasn't under his supervision and that he is no longer with the company.

(Testimony of Edward K. Pitcher.)

The Court: The objection is overruled. The witness may answer the question.

A. What difficulty I had with him?

Q. (By Mr. Riley): No, what difficulty he had when he worked for the company, if any.

Mr. Koch: It's leading also, your Honor.

The Court: I do not recall that anyone has testified that he had any difficulty. Do you?

Mr. Riley: I'll phrase it differently.

Q. (By Mr. Riley): Do you know whether or not he had any difficulty——

The Court: The question is withdrawn. Draft another one. [145]

Mr. Riley: I will, Your Honor.

Q. (By Mr. Riley): Do you know whether or not Mr. Wean had any difficulties, personal, or otherwise, when working for the company?

A. By that do you mean home trouble, or——

Q. Was he ill? A. No.

Q. Was he an alcoholic?

A. Oh, he got stewed occasionally, I guess, on his own time. Not when he was working.

Q. Well, would you say yes or no whether or not he was an alcoholic?

Mr. Koch: I object to the question, Your Honor.

The Court: The objection is overruled.

A. I couldn't answer that either way. I couldn't say he was an alcoholic.

Q. (By Mr. Riley): Can you say whether or not he drank a lot or a little?

(Testimony of Edward K. Pitcher.)

A. Well, he had periods when he'd drink quite a bit, he'd be absent from work.

Q. Did he ever come to work under the influence of alcohol that you know of?

A. Not that I know of. [146]

Q. Did he ever come to work after he had been drinking that you know of? A. Yes.

Q. Were the effects apparent?

A. No. If they had been I'd have sent him home.

Mr. Koch: I didn't hear the answer.

The Court: "No. If they had been I would have sent him home."

Q. (By Mr. Riley): Were you there at all times that he worked? A. No.

Q. How many crews do you have under your control for inspection of the aircraft, Mr. Pitcher?

A. At that time I had——

Q. At that time.

A. At that time I had three crews.

Q. Are you familiar with those portions of the—are you familiar with the Northwest Airlines operations manual? A. Fairly.

Q. Are you required in your work to consult the manual?

A. Yes, a certain portion of the manual.

Q. Do you know whether or not the manual prescribes the location and configuration of DC-4 type aircraft relating specifically to the placement of life rafts and life vests? [147]

A. Yes.

(Testimony of Edward K. Pitcher.)

Q. Is it a function of your—is it one of your functions to determine that the aircraft which your crews inspect are in conformity with the Northwest operations manual?

A. It's not our duty to inspect the aircraft. That comes under the Inspection Department.

Q. I see. Do you determine that the equipment is in the aircraft?

A. It's not our duty to do that, no.

Q. Well, do you?

A. Well, as a matter of course we do. We see that the equipment is there. If it isn't we'd start hollering about it, but it's not our primary job.

Q. Whose duty is it?

A. The installation of the rafts and lifesaving equipment is a mechanical function. It's done by the mechanics. It's inspected by the Inspection Department. We provide the literature necessary for the type of airplane.

Q. And you ascertain that the literature then is in conformity with the aircraft?

A. That's right.

Q. I see.

Mr. Riley: Now may the witness see Plaintiffs' Exhibit 12. [148]

The Court: It will be shown the witness.

(The exhibit was handed to the witness.)

Q. (By Mr. Riley): Is what you have before you a portion of the Northwest Airlines operations manual? A. Yes, it is.

Q. Does that portion or does any portion of

(Testimony of Edward K. Pitcher.)

the portion you have before you indicate the configuration for cabin interiors relating specifically to the location of life rafts and life vests for DC-4 type aircraft of Northwest Orient Airlines?

A. Yes, it does.

Q. Would you look at the diagrams there and indicate where the life rafts should be placed in DC-4 type aircraft?

A. There's three different types here. They are all generally in the location of the main cabin door.

Q. Are they forward or aft of the main cabin door?

A. Well, on one of them here it's directly across from the main cabin door.

Q. Would you state that again please, sir?

A. On this one here it's directly across from the main cabin door.

Mr. Riley: At this time I ask, Counsel has been subpoenaed to produce the type of literature that was installed in the aircraft at the time of the crash [149] and I believe he has it here and I'd like to have it marked for identification and so identified.

The Court: That may be done.

The Witness: There's two of them here that are forward of the cabin door.

Q. (By Mr. Riley): Would you state that again, please?

A. There are two of them that are forward of

(Testimony of Edward K. Pitcher.)

the cabin door and one of them directly opposite the cabin door.

The Clerk: Plaintiffs' Exhibit No. 13.

(Flight literature was marked Plaintiffs' Exhibit No. 13 for identification.)

Mr. Riley: I offer Plaintiffs' Exhibit 13 in evidence, if Your Honor please, the exhibit having been identified or supplied to us as literature which was installed in the aircraft at the time of the crash.

Mr. Koch: No objection, Your Honor.

The Court: Admitted.

(Plaintiffs' Exhibit No. 13 for identification was admitted in evidence.)

The Court: At this time we will take the overnight recess in the trial. What would you call that paper, Plaintiffs' Exhibit 13?

A. They are called the ditching folder or emergency folder.

The Court: Ditching folder? [150]

A. Ditching folder is what they call it.

The Court: Will you return in the morning at ten o'clock, Mr. Pitcher, and you may step down at this time. Court is adjourned at this time until tomorrow morning at ten o'clock.

(Thereupon, at 4:35 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Wednesday, March 27, 1957.)

Wednesday, March 27, 1957. 10:00 o'clock a.m.

(All parties present as before.)

The Court: Counsel may proceed in the case on trial when you are ready.

Mr. Riley: May it please the Court, we would like to interrupt the testimony of Mr. Pitcher at this time to present medical testimony on behalf of Mr. Maynard. I have Dr. Seering in court ready to testify at this time.

The Court: The Court approves of that interruption and you may call the doctor, and Mr. Pitcher is temporarily withdrawn from the stand for the purpose mentioned. [151]

Mr. Riley: Thank you, Your Honor.

(Witness Pitcher temporarily withdrawn from stand.)

(Dr. Albert H. Seering, called as a witness by plaintiffs, was sworn and testified.)

(The deposition of Dr. Earle Conwell was read.)

The Court: Do you offer this deposition as a part of the plaintiffs' case in chief?

Mr. Riley: I do, Your Honor, if the Court pleases, at this time.

The Court: Do you intend to offer as a part of plaintiffs' case in chief any more medical testimony?

Mr. Riley: I do not, Your Honor.

The Court: Very well. Does that assist opposing Counsel, those for the defense, in determining now whether you wish to ask any further questions of the plaintiff Maynard?

Mr. Karr: Yes, Your Honor. I would like to

have an opportunity to examine Mr. Maynard further.

The Court: The Court would ask you to begin that at 1:30, and be prepared to ask him beginning at that time all of the questions which you think the defendant might wish to ask him during this trial, and [152] if it is necessary to make him your witness for any part of it, the Court asks you to consider doing that. My understanding is now you are recalling him for further cross examination.

Mr. Karr: That is correct, Your Honor.

The Court: Mr. Maynard, please be here at 1:30 this afternoon for further interrogation.

Mr. Maynard: Yes, sir.

The Court: This court will be at recess until 1:30.

(Thereupon, at 12:00 o'clock noon, a recess herein was taken until 1:30 o'clock p.m.)

Wednesday, March 27, 1957. 1:30 o'clock p.m.

(All parties present as before.)

The Court: When Counsel are ready you may proceed.

Mr. Karr: I think Mr. Maynard is to take the stand, Your Honor.

The Court: You have already been sworn, Mr. Maynard. Resume the stand.

HUFFORD DONALD MAYNARD

(resumed the stand)

Cross Examination—(Continued)

Q. (By Mr. Karr): Mr. Maynard, I believe I

(Testimony of Hufford Donald Maynard.)

understood Dr. Seering this morning to say that he examined you on Monday of this week. Is that correct?

The Court: May I interrupt? You are now further cross examining him in connection with the plaintiffs' case in chief?

Mr. Karr: Yes, that's correct, Your Honor.

The Court: You may proceed.

Q. (By Mr. Karr): Is that correct, sir?

A. Yes, sir.

Q. That's the day this trial started, was the first time [154] you had seen Dr. Seering?

A. Yes, sir.

Q. And when was it you arrived in Seattle?

A. The 7th or 8th.

Q. Of this month? A. Yes, sir.

Q. Now, I think you said you had seen Dr. Dean Crystal before you saw Dr. Seering. When did you see Dr. Crystal?

A. Let's see. About the 10th, I guess it was.

Q. Shortly after you arrived in Seattle?

A. Yes. It wasn't too long.

Q. He examined you at that time?

A. Dr. Crystal, yes, sir.

Q. And did I understand that you had seen Dr. Ruuska before you saw Dr. Crystal?

A. Yes, sir.

Q. That would be then within a day or two after you arrived in Seattle? A. Yes, sir.

Q. Mr. Maynard, I understood Dr. Seering to testify that in taking your history as a part of his

(Testimony of Hufford Donald Maynard.)

examination he understood you to say that you had suffered from pain and tightness in your legs from shortly after the accident. Did you tell him that?

A. I don't recall exactly what I told him, no, sir.

Q. Well, did you tell him that you had had a condition of pain and discomfort in your legs during the year or two following the accident?

A. Yes, sir, I did.

Q. That is not correct, is it, sir?

A. Yes, sir, it is.

Q. You recall, do you not, the deposition previously referred to which we took in our office on the 7th of this month? A. Yes, sir.

Q. Do you recall on that occasion my asking you whether or not you had had difficulty in the nature of pain and discomfort, trouble in your legs, after you were home in Alabama and went back to Japan on duty, do you recall my asking about that? A. Yes, sir.

Q. You told me you didn't have any such difficulty, did you not, for a year or two after the accident?

A. I was referring to the type of pain that I have now.

Q. You told me you didn't have trouble for a year or two after the accident, did you not, sir?

A. I don't quite remember exactly what I said, no, sir.

Q. May I ask you if I didn't ask you—I was examining you, you will recall, about your condi-

(Testimony of Hufford Donald Maynard.)

tion after you [156] had been home for the roughly forty days following the accident and when you returned to Japan for about nine months or a year additional duty. You remember that sequence of events. Do you recall my asking you, "So you were back on the job then less than a year after you returned from the accident?" and you answered, "Right." Question: "During that time what was your condition so far as your legs were concerned?" Didn't you answer, "Well, I—it soon got over that and it didn't bother me hardly. Actually it didn't really start bothering me until about two years ago, I guess."

A. That is what I——

Q. You answered that, did you not, sir?

A. I said that, yes.

Q. And I then proceeded to ask you, Question: "I see. Well, up to the time of your discharge you didn't have any trouble?" You answered, "Yes."

Question: "Did you notice it at all? Did you have any trouble after you got back to Japan?" And didn't you answer me, "Not that I remember of. Of course that's been quite some time ago. I can't remember too good about that time. Like I say, it only bothers me when I'm doing a lot of walking or a lot of standing around." And didn't I ask you then, [157] "But you don't remember having that sort of experience during that year more or less after you returned to Japan?" Answer: "No."

That's what you told me in the deposition, is it

(Testimony of Hufford Donald Maynard.)

not, sir? A. Yes, sir.

Mr. Karr: May I have an exhibit marked?

The Court: You may.

The Clerk: It will be marked Defendant's Exhibit No. A-17.

(Military medical record of plaintiff Maynard was marked Defendant's Exhibit No. A-17 for identification.)

(Defendant's Exhibit No. A-17 for identification was examined by Counsel for plaintiff.)

The Court: Mr. Karr, does this exhibit last marked for identification obviously have an appropriate name that can be assigned to it or is it a rather complicated name?

Mr. Karr: No, Your Honor, it's medical record of Mr. Maynard during his military service. Military medical record of the plaintiff.

The Court: Do you agree that that is the type of thing it is, Mr. Riley? [158]

Mr. Riley: It is a report of medical examination at the time of discharge, separation, Your Honor.

The Court: Does it have any constituent basic papers attached to it?

Mr. Karr: I don't understand what Your Honor means.

The Court: I am trying to see if the name "Medical Report" is inclusive of the nature of all the information that is connected with it.

Mr. Karr: The name of "Medical Report" is

(Testimony of Hufford Donald Maynard.)
not inclusive. "Medical Record" would cover all of it.

The Court: It is military—what do you call it?

Mr. Karr: Military medical record, Your Honor.

Mr. Riley: Well, I object to it as a medical record.

The Court: Nothing has happened with respect to it except the marking. Save your remarks until an offer is made of it or until something is done in the meantime.

Q. (By Mr. Karr): Mr. Maynard, would you thumb through that briefly and see if you can identify each of the pages as carrying your name? I think the second page [159] is the reverse of the first page. It may not have your name on it.

A. Yes.

Mr. Karr: We offer it in evidence, Your Honor. I might explain for the purpose of the record that a certified copy of the complete record is here, and I believe——

The Court: Let opposing Counsel see it, if he has not.

Mr. Karr: He has seen it.

Mr. Riley: My objection to it is that it is not the complete record. It's only a part of the record. It's a single report of an examination, and it's not the complete record.

The Court: I do not know that that is a necessary condition to admissibility, that all of the records be here.

(Testimony of Hufford Donald Maynard.)

Mr. Riley, do you deny that this exhibit contains a true photostatic copy or copies of Enlistment Record, United States Air Force, NME Form 4, that is one thing; Service Record, WD AGO Form 24A, that is another thing; two Reports of Medical Examination, Standard Forms 88, that is a third item; two Reports of Medical History, Standard Forms 89, that is a fourth item; three Medical Report Cards, WD AGO [160] Forms 8-24, that is another item; six Miscellaneous Tests or Examinations, Standard Forms 514m, those comprise another item; Clinical Record Cover Sheet, WD AGO Form 8-33, which comprise still another item; Record of Outpatient Service, AF Form 277, and Individual Certificate of Medical Clearance, the originals of which are in the custody of the Adjutant General of the United States Army, comprising another item; three Serology Reports, Standard Forms 514c, and Report of Separation from the Armed Forces of the United States, DD Form 214, copies of which are in the custody of the Adjutant General of the Army, is still another item.

Do you deny the accuracy of that certificate as to those facts?

Mr. Riley: No, Your Honor, I do not deny the accuracy of that certificate.

The Court: Is that all it is that you offer, is what is stated in that certificate?

Mr. Karr: Well, it isn't everything in the certi-

(Testimony of Hufford Donald Maynard.)

ficate that is offered, Your Honor. What I have done is this:—

The Court: What I mean to say is does the exhibit comprise the things as accurately reflected by this certificate? [161]

Mr. Karr: The exhibit comprises a portion of the things covered in the certificate, Your Honor. It does not include all of them because the complete record includes a great deal of Mr. Maynard's medical history with the U. S. Army that wouldn't have any—

The Court: Read the certificate again. Just look at it. In this exhibit marked for identification Defendant's Exhibit A-17 does it now comprise each one of those items mentioned by me as items stated in that certificate?

Mr. Karr: No, the exhibit does not comprise each one, Your Honor.

The Court: It does not comprise all parts of each one of those items?

Mr. Karr: It does not comprise—

The Court: What has become of the parts that it does not include?

Mr. Karr: Well, I have done this, Your Honor, —may I explain?

The Court: Yes.

Mr. Karr: This record, as Your Honor will find from the certificate, covers Mr. Maynard's full period of enlistment with the Air Force from 1949 to 1953. A portion of this record in my judgment has no relationship to this lawsuit. As a conse-

(Testimony of Hufford Donald Maynard.)

quence, in [162] having the record converted from the white on black to black on white I had photostated the parts that I think are material and admissible. I have no objection if Mr. Riley wants to offer additional parts.

The Court: The only reason you are entitled to the admission in evidence of A-17 is the support which admissibility receives from that certificate.

Mr. Karr: I understand that, Your Honor.

The Court: And that certificate does not certify as to what you have here, therefore the objection is sustained.

(Defendant's Exhibit No. A-17 for identification was refused.)

Mr. Karr: Your Honor, I'm afraid I haven't made myself clear. This certificate——

The Court: You may not accept the ruling. I hardly think that is the trouble. My understanding is that that certificate is one thing and you have here parts only of the things mentioned in that certificate.

Mr. Karr: That is correct, Your Honor, but the certificate——

The Court: I will not be able to admit it in evidence.

Mr. Karr: I'm sorry, I don't—— [163]

The Court: I have made a ruling and it will have to stand. I ask you to proceed.

Mr. Karr: May I ask that the——

The Court: I would say only this in addition, that if you tender to this Court a photostat copy

(Testimony of Hufford Donald Maynard.)
or photostat copies on white background of each and every thing that is in that certificate together with a photostat copy of that certificate, the Court will consider the matter again as to admissibility, but the Court will not again consider parts of the things which are mentioned in that certificate. That certificate is the thing on which admissibility as to any part of it depends. That is what the statute applies to as to admissibility, and not parts of the certificate. You may proceed.

Mr. Karr: May I ask that the exhibit be handed to Mr. Maynard?

The Court: That will now be done.

(Defendant's Exhibit No. A-17 for identification was handed to the witness.)

Q. (By Mr. Karr): Will you turn to the fourth page in that group of papers, Mr. Maynard. Do you recognize your signature? A. Yes.

Q. That is your signature, is it, sir? [164]

A. Yes, sir.

Mr. Karr: I believe that's all then, Your Honor, at this time.

The Court: I am not clear in my mind on what parts of this exhibit for identification A-17 he so identified his signature.

Mr. Karr: On the fourth page, Your Honor.

The Court: One, two, three, four. I see that.

Mr. Karr: Yes.

The Court: Is that the only one?

Mr. Karr: That's the only one that bears his signature, Your Honor.

(Testimony of Hufford Donald Maynard.)

Q. (By Mr. Karr): Mr. Maynard, have you seen the exhibit sufficiently that you now recognize it as a copy of a portion of your service record during your enlistment with the U. S. Air Force?

A. Could I look at that again, please?

(The document was handed to the witness.)

A. This is the discharge examination when I got discharged.

Q. And by "This" you are referring to what, Mr. Maynard, the first several pages or the entire exhibit?

A. The one with my signature on it.

The Court: What about the three pages ahead [165] of it?

A. That is the same thing, the best I can see.

The Court: Is it a part of that material as to which you signed on Page 4 or is it not? Look at it and see if you can tell, and if so, answer.

A. Well, sir, the two pages that I have my signature on is the one that I made out. The other one the doctor made out.

The Court: Was the doctor's making out as you have just now described it in effect a part of the papers that you intended to sign and by signing approve the accuracy of, the signing inquired of by the Court being on the fourth sheet of those small sheets of paper which are a part of Defendant's Exhibit A-17?

A. Sir, for the one that I did sign, yes, sir, but I didn't—it wasn't necessary for me to sign the other one, because that's the doctor's report.

Mr. Riley: May I ask a question?

(Testimony of Hufford Donald Maynard.)

The Court: You may. You may interrupt to ask a question.

Mr. Riley: Do you know whether or not—do you know anything about the doctor's report? Did you see it at the time you signed it? [166]

A. I didn't sign the doctor's report.

Mr. Riley: Did you see it at the time you signed the other part? A. No, sir.

Mr. Riley: And you don't know what it contains now? A. No, I don't.

Mr. Riley: I think that would be sufficient, Your Honor. He can't identify it.

The Court: It all depends on whether it was a part of the thing that he signed. I will have to depend upon Counsel for further information upon that. If the doctor's report was made out on the paper or group of papers which he obviously was validating as approving by his signature thereon, no matter whether he read each word in it or not, the Court might be confronted with the necessity of ruling upon the admissibility as to that. It might present a situation similar to a contract consisting of four pages, only one of which has a signature page, the last one, and the question arising as to whether the signature of one of the contractors on that page was with reference to the three preceding pages also. You may proceed.

Mr. Riley: At the time you signed Page 4 were you given any other papers to examine at the same [167] time? A. No, just Page 4.

(Testimony of Hufford Donald Maynard.)

Mr. Riley: Do you remember seeing the other pages there at the same time?

A. No, I don't.

Mr. Riley: Do you have any reason to believe that they were there at the same time?

A. No.

The Court: That is all. You may inquire, Mr. Karr, if you wish to.

Q. (By Mr. Karr): Mr. Maynard, will you please look at Page 3 and tell us whether that is not a part of the same instrument as Page 4, Page 4 being a second part of the same paper?

A. I believe it is, yes.

Q. Now, I think the question I asked you just a little while back was, would you please examine all of the exhibit and tell us whether or not you do not recognize all of it as a portion of your medical service record while you were with the Air Force.

A. The pages three and four, I definitely know that is part of the form I filled out for discharge. These other forms, I can't swear to that because actually I don't know. It has my name on it.

Q. Do you question whether it is a part of your service [168] record?

A. For pages three and four, yes, sir.

Q. With the exception of pages three and four you question whether the balance is a part of your service record?

A. I don't know whether they are or not.

Q. Very well.

(Testimony of Hufford Donald Maynard.)

Mr. Karr: I won't pursue that further at this time, Your Honor. I have no further questions of the witness at this point, Your Honor, except I would like to explain this: I'm afraid I haven't made it clear to the Court the reason I didn't have all of the pages attached to this certification reproduced was because I considered some of them immaterial, but since apparently I can't do it that way I will have them reproduced, so I will later offer reproductions of the entire—all the pages attached to the certification. I don't believe I will need Mr. Maynard here for that purpose.

The Court: Mr. Riley, can you project yourself into the future to that point when he will, if he does, offer what is obviously a true photostat copy of everything under the seal of that certification, that official certification?

Mr. Riley: I believe I can. You mean with respect to examining Mr. Maynard, Your Honor?

The Court: Yes, and with respect to your attitude on the admissibility if he offers a complete set of those papers.

Mr. Riley: I believe I can, and may I confer briefly?

The Court: Yes, you may.

(Brief pause.)

The Court: May I interrupt you to suggest that that question at that time as to whether such a copy will be admissible, as I understand it would be, unless you insisted that only the thing itself could be admitted, would be admissible. I under-

(Testimony of Hufford Donald Maynard.)

stand that there was a prospect that plaintiffs' Counsel would have no more objection to a white background photostat copy of this original certified or certificated black background file than he would to the original certificated file itself. Do you suppose that will be your attitude? And you may answer after you have conferred with Counsel, because that is all there is in it. If Mr. Karr at this moment had a photostat copy of the entire file in the same form and in the same order together with a proper photostat of the certificate itself, would you have any objection to his offering that instead of this original certificated file? That is the question. In order that he may [170] comply with the rules of this local court.

(Brief pause.)

Mr. Riley: Well, your last question, Your Honor, if the whole thing were submitted, we wouldn't have objection.

The Court: I have no right to change that certificate, Mr. Karr, and in view of what I understand to be plaintiffs' Counsel's present attitude, the only question that is involved is to present a true and correct copy of that certificated file, that is all.

Mr. Karr: Very well. I understand.

The Court: And I advise Counsel that there is no question in my mind but what the certificated file, were it not for our local rule, would now be admissible in this trial right now on the face of the certificate alone. You may proceed.

(Testimony of Hufford Donald Maynard.)

Mr. Karr: Is Mr. Riley through? I'm not clear.

Mr. Riley: I have a couple questions.

Mr. Karr: Oh.

Redirect Examination

Q. (By Mr. Riley): Well, Mr. Maynard, Counsel cited to you your deposition taken in his offices on March 7th pursuant to our [171] agreement with him and in response to his question, "During that time what was your condition so far as your legs were concerned?" you stated, "Well, I—it soon got over that and it didn't bother me hardly. Actually it didn't really start bothering me until two years ago, I guess."

Now would you explain what you meant by that statement?

A. Yes. What I meant by that statement is that my legs were bothering me but I didn't pay any particular attention to it because I figured it was an after effect of the cold water and I figured it would soon go away. Actually what I tried to say there is that it didn't start hurting real bad. In other words, it increased as it went along.

Q. All right. Then the question—

The Court: May I with Counsel's consent ask one question not within the scope of this redirect examination or of Mr. Karr's further cross? I wish you for my convenience would restate how long you think your feet or legs or both were exposed to the actual presence of that sea water while you

(Testimony of Hufford Donald Maynard.)

were on and about that wing of the airship that you mentioned previously after the crash.

A. Sir, it was about an hour and a half. [172]

The Court: You may proceed.

Q. (By Mr. Riley): The next question that Mr. Karr called your attention to stated, "Did you notice it at all? Did you have any trouble after you got back to Japan?" and you answered, "Not that I remember of. Of course that's been quite some time ago. I can't remember too good about that time. Like I say, it only bothers me when I'm doing a lot of walking or a lot of standing around."

Would you explain that statement?

A. Well, it's like I said there, it's been some time and the actual incidents in it, and then as I say, it increased up to now where even less walking than I did during those days will bother me, and in my particular job I didn't have the occasion to do much walking except once in a while they'd have a parade or an inspection, which was very seldom that they had 'em.

Q. You have submitted to several physical examinations, one by the defendant's doctor and Dr. Conwell and again here in Seattle, with respect to your legs and feet. Were you examined in any similar manner in any of the medical examinations given to you when you were released from the Air Force or when you entered or were released from the Marine Corps? [173]

A. No, I wasn't.

(Testimony of Hufford Donald Maynard.)

Q. On any of those occasions were you questioned directly about your legs?

Mr. Karr: I object to that, Your Honor. It is leading. This is his client.

The Court: That objection is overruled.

Q. (By Mr. Riley): On any of those occasions were you questioned directly about your legs?

A. No, sir, I wasn't.

Q. On any of those occasions were your legs and feet examined?

A. No, sir, they were not.

Q. On any of those occasions were any measurements of blood pressure or pulses taken on any portions of your lower extremities?

A. No, sir.

The Court: What happened as to this examination with respect to those legs, considering your own part in the performance and the doctor's part in the performance? Just tell everything that happened, if anything happened, about your legs.

A. You mean in getting discharged from the service, sir?

The Court: No, when this examination was made about which Mr. Riley was inquiring. What did [174] you do about your legs, what did the doctor do or say about your legs and what did you do or say about your legs, if anything? I want to hear the whole story.

A. I didn't say anything about my legs, sir. They checked——

The Court: You did not say anything about it

(Testimony of Hufford Donald Maynard.)
and the doctor said nothing about it, is that what the situation was? A. Yes, sir.

The Court: You may inquire.

Mr. Riley: I have no further questions, Your Honor.

Recross Examination

Q. (By Mr. Karr): Mr. Maynard, Mr. Riley just asked you if when you took the medical examination for admission to the Marine Corps there was any examination of your legs and you said no. That is not correct, is it, sir?

A. Well, he said with blood pressure.

Q. No, he asked you about the examination of your legs.

A. They check to see if you have fallen arches, yes, sir.

Q. Well, they did considerably more than that, did they not, sir?

A. Not that I remember. [175]

Q. Let us review the initials of that Marine Corps medical. What are they?

A. P-u-l-e-s—u-e-s.

Q. P-u-l-h-e-s, isn't that it? What did the "l" stand for, do you remember? A. Yes, sir.

Q. "Lower extremities", didn't it?

A. Yes, sir.

Q. That meant that they examined your legs, did it not, sir? A. Yes, sir.

Q. And they graded you after a complete examination of your legs as they graded all other recruits in different categories depending upon

(Testimony of Hufford Donald Maynard.)

whether you had anything wrong with you or not, isn't that right?

A. They give you an examination, but it's not a real thorough one.

Q. In your opinion it wasn't thorough, but they graded you, that was the question I asked you, didn't they? A. Yes, sir.

Q. And they graded some recruits in the top grade and some in the middle and some of them lower and the like, did they not?

A. Yes, sir.

Q. And you were graded in the highest category on the [176] examination of your legs, were you not, sir? A. Yes, sir.

The Court: What branch of the service was this?

A. That was the Marine Corps, sir.

The Court: That is the examination the Marines gave you, is that right?

A. Well, actually, no, sir. The Navy Department does the examination.

Q. (By Mr. Karr): The Navy Department gave the examination upon your application to the Marines; right, sir?

A. Yes, sir. All the medical personnel in the Marine Corps are—with the exception of a very few doctors, they are Navy personnel.

Q. That examination, as I recall, was sometime in 1954, was it not, sir? A. Yes, sir.

Q. That was at about the time you took the thirteen weeks of boot camp at Parris Island?

A. That was—right, yes, sir.

(Testimony of Hufford Donald Maynard.)

Mr. Karr: That's all.

Redirect Examination

Q. (By Mr. Riley): Would you state what examination they made of your [177] lower extremities?

A. They had you to go up on your toes and they checked to see if you had arches or not, and they would tell you to walk away from them and back towards them, see if you had toes missing, and that type.

Q. Is there anything else that you can recall?

A. Not that I can recall, no, sir.

Q. Did they check you——

The Court: If you can recall your age, what was your age then?

A. My age, sir, was——

The Court: At that time when that examination was made.

A. About twenty-five, I think—no, sir, wait a minute now.

The Court: You were fairly mature as a young man, weren't you?

A. Yes, sir. I was twenty-six, something around there. I——

The Court: You knew the reputation of the Marine Corps as to being hard or soft duty in the military service?

A. Yes, sir.

Mr. Riley: I have no further questions, if the Court please. [178]

The Court: Is there anything else?

(Testimony of Hufford Donald Maynard.)

Mr. Karr: Yes, Your Honor. One additional question.

Recross Examination

Q. (By Mr. Karr): There had been another medical examination by the military in January of 1953, a year after the accident, in which they had also examined your legs, was there not, sir?

A. In '53 after the accident?

Q. Yes, sir, January of '53, shortly before your discharge from the Air Force.

A. Do you mean other than the discharge examination?

Q. No, I mean the discharge examination. We have just talked about the examination when you went into the Marines in July of '54. Now, there had been a discharge examination from the Air Force in January of '53, had there not?

A. Yes, sir.

Q. In which they checked on your legs, too?

A. The same type of examination, yes, sir.

Mr. Karr: I have nothing further, Your Honor.

The Court: Is there anything further, Mr. [179] Riley?

Mr. Riley: No, Your Honor.

The Court: You may step down.

(The witness was excused from the witness stand.)

The Court: You may proceed with the plaintiffs' case in chief.

Mr. Riley: I'll recall Mr. Pitcher.

EDWARD K. PITCHER
(resumed the stand.)

Direct Examination—(Continued)

Q. (By Mr. Riley): Now, Mr. Pitcher, you stated that your title is supervisor of equipment service? A. That's right.

Q. And you stated that your duties are cleaning and supplying the aircraft with all the necessary equipment for their flights?

A. That's right.

Q. And that it is your responsibility to see that the aircraft are supplied in the case of over water flights with the ditching folders which we began discussing yesterday sufficient for the round trip?

A. That's right. [180]

Q. Overseas. Is it your responsibility to see that the safety equipment installed in the aircraft is installed in the locations specified by the maintenance manual of the airline for that particular type of aircraft? A. No, it's not.

Q. Whose responsibility is that?

A. The inspection department.

Q. And in Seattle in 1952 who was the individual in charge of the proper placement of safety equipment?

A. I believe it was Mr. Ophsahl.

Q. Is it his responsibility—are you responsible for the placement of flares in the aircraft?

A. No, we're not.

Q. Are you responsible for the placement of emergency lighting in the aircraft?

A. No, we're not.

(Testimony of Edward K. Pitcher.)

Q. Are you responsible to see that life rafts are in the aircraft? A. No, we're not.

Q. Are you responsible to see that life jackets are stowed in the aircraft? A. No, we're not.

Q. But it is your duty to supply the aircraft, is it not?

A. With certain items, yes, sir.

Q. I understood you to state that it was your duty to see [181] that these items were in the aircraft before the flight.

A. No, it's not our duty.

Q. In the case of life rafts, that is Mr. Ophsahl's function?

A. That is their duty on the final inspection, yes, sir.

Q. You state "final inspection". Now would you state what you mean by "final inspection"?

A. Preflight inspection.

Q. This inspection is completed prior to each flight? A. That's right.

Q. Didn't you state yesterday that you checked to see if the aircraft does have these items?

A. I believe I said that we did because we're pretty closely associated with the airplanes, we're supplying the literature for them, and at the time we supply the literature we also look around to see if the stuff is on.

Q. I see.

A. While it's not our duty, we generally look it over.

Q. Now referring to Plaintiffs' Exhibit 12 which you yesterday identified as a portion of the

(Testimony of Edward K. Pitcher.)

Northwest Orient operations manual for DC-4 type aircraft, would you look through those portions you have before you and tell me whether or not it provides how many Mae [182] Wests, life jackets, will be installed in DC-4 type aircraft?

A. That question was how many?

Q. Yes, sir, how many life jackets are required to be installed in DC-4 type aircraft?

A. One for each passenger.

Q. And how many is that?

A. Well, that would be one for each seat of the airplane.

Q. Does not that portion of the manual prescribe the number of seats will be the standard configuration in DC-4 type aircraft in the Northwest operation?

A. This describes several seating arrangements.

Q. All right. How many jackets are required in the maximum of the several configurations you have before you? ..

Mr. Koch: Your Honor, I object to that question because we're only concerned with the provisions of the pamphlet, if that pamphlet covers it all, of the seating on the particular flight in question, and to take out a manual reference dealing with seating and life vests for another type of plane and a different location and place of flight is only confusing the record so that we'll have difficulty understanding exactly what the duties imposed with respect to the aircraft in question really are. [183]

Mr. Riley: That's what I'm trying to bring out,

(Testimony of Edward K. Pitcher.)

Your Honor, is how many life jackets were required to be stowed aboard the aircraft, and I'm asking Mr. Pitcher to tell me.

The Court: The objection is overruled.

Q. (By Mr. Riley): Are you able to tell, Mr. Pitcher?

A. To the best of my knowledge, one for each seat of the aircraft plus the additional ones, of course, for the crew and the stewardess.

Q. Do you know how many seats were in Flight 324 of January 19, 1952?

A. No, I don't.

Q. You were familiar with the aircraft and the accident of the aircraft involved?

A. Yes. We had a number of aircraft. I was familiar with it, but not the number of seats. I don't recall that.

Q. For over water navigation flight, such as Flight 324 was, involving leaving Seattle for Japan and return contemplating a round trip, would you determine from the manual before you which sketch and configuration would be applicable to that particular type of flight and determine from the sketch then how many life jackets are required in numbers?

Mr. Koch: Your Honor, I would like to make [184] a further objection. This witness has testified that he is the supervisor of equipment service, that it's a different department, the inspection department, under Mr. Ophsahl, is in charge of the equipment itself and the inspection of it.

This witness does not know of this material, it

(Testimony of Edward K. Pitcher.)

isn't his function, he's not in charge of it, and I think he shouldn't be questioned with respect to it.

The Court: The objection is overruled.

A. Would you repeat the question, please?

Mr. Riley: Would you repeat the question, Mr. Reporter?

The Court: The reporter will do that.

(The reporter read the last question.)

A. I couldn't answer that because I don't know how many seats were on that aircraft.

Q. (By Mr. Riley): Yesterday you testified that this publication that you have before you now prescribes the configuration of DC-4 type aircraft in Northwest Airlines operations. Aren't you able to tell from the sketches before you which of the sketches would be applicable?

A. This is a DC-4 type aircraft on Northwest. However, there's a number of different types of DC-4's. This only covers about two or three, and—— [185]

The Court: Ask him another question.

Q. (By Mr. Riley): Then from the sketches before you what is the maximum number of Mae Wests that would be required in any conceivable situation?

Mr. Koch: I object again, your Honor, because that isn't this situation. He should be inquiring——

Mr. Riley: I asked for the maximum number, if your Honor please.

The Court: The word "conceivable," if it were normal, that would be one thing, but you have not

(Testimony of Edward K. Pitcher.)

asked him for the normal conceivable. The objection is sustained.

Q. (By Mr. Riley): Would you examine the sketches before you, Mr. Pitcher, and determine what would be the maximum number of life jackets required in any normal configuration of aircraft, DC-4 type aircraft?

The Court: Of the type in use in this flight.

Q. (By Mr. Riley): Of the type in use in this flight.

A. Well, that's not in my department and I wouldn't be able to determine that because I have nothing to do with it. I've never had to set up an airplane of that type. We merely supply the literature for that airplane regardless of the number of seats. [186]

Q. All right, and you testified yesterday that you're required to put in ditching literature which is the same and which applies to the particular aircraft on a particular flight; didn't you say that?

A. Oh, yes.

Q. Then how can you tell you've got the right kind of literature if you don't know what type of equipment is required?

A. That's put on according to the check lists. We're required to put on 150.

Q. 150 what?

A. Of those pieces of literature.

Q. Well, how do you know you've got the right kind of literature and the right kind of airplane if you don't know what stuff is going into the particular airplane?

(Testimony of Edward K. Pitcher.)

Mr. Koch: Your Honor, this sounds a great deal like cross examination and I object to the question, the form of it and the manner in which it is presented.

The Court: You have not called the witness as an adverse witness.

Mr. Riley: Well, your Honor, yesterday that came up and your Honor sustained an objection and I felt there was a problem there and I last night checked the rules of civil procedure and I came upon [187] Rule 43b dealing with the scope of examination and cross examination. Mr. Pitcher has been——

The Court: That relates to calling an adverse witness, does it?

Mr. Riley: Yes, it does, if your Honor please, and Mr. Pitcher as a witness has identified himself as the supervisor of equipment service. Now, he is an employee of the defendant. I state now that we have called him as a hostile witness. He is an employee of the defendant corporation, and Rule 43b states,

“A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director or managing agent of a public or private corporation or any partnership or association which is an adverse party and interrogate him by leading questions and contradict him and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also

(Testimony of Edward K. Pitcher.)

and may be cross examined by the adverse party"—
et cetera. [188]

The Court: You do not think he qualifies as an adverse witness as a managing agent, officer or director, do you?

Mr. Riley: He says he's the supervisor of equipment service for Northwest.

The Court: How many managing agents do you claim have been shown to be employed at Seattle for the defendant?

Mr. Riley: Well, your Honor, I think that the term should be construed not strictly. A managing agent, if they meant the manager or the office manager or the area manager, it seems to me they could have used a more restrictive term. I felt that that term should include anyone who has under his direction and control the personnel, as Mr. Pitcher does and as Mr. Peterson does.

The Court: What would you do with Mr. Peterson if you are going to call this witness the managing agent? What category do you think Mr. Peterson ought to be put in?

Mr. Riley: He probably is the managing agent for this area, for the whole western region. He states his area goes for the whole western region, and it seems to me that department heads of the defendant corporation certainly fall within that rule. [189]

The Court: The Court rules that he does not qualify as an adverse party or an officer, director or managing agent of a private corporation, and

(Testimony of Edward K. Pitcher.)

so forth, but it is questionable as to whether he is an unwilling witness. I do not think he is hostile. There may be some unwillingness.

The Court overrules this objection until the Court is more certain that he is willing to give such information as he has. He has not shown any great hostility, but I am not so sure about his willingness, and for that reason I overrule the objection.

Q. (By Mr. Riley): Can you answer the last question then, Mr. Pitcher?

A. You wanted to know how we——

Mr. Koch: The objection was sustained to the last question, your Honor. I think Mr. Riley should ask another question.

The Court: No, the Court overrules the last objection. That was what I intended to do. If I misspoke myself I am sorry and I would not complain about Counsel's further statement. Proceed.

Q. (By Mr. Riley): Would you like the question repeated? A. I would, yes, please.

(The reporter read the question as [190] follows: "Well, how do you know you've got the right kind of literature and the right kind of airplane if you don't know what stuff is going into the particular airplane?")

A. The number of the ditching folders required on all aircraft is on a check list. I believe at the time on that type of aircraft we put 150, which would be more than sufficient for any number of passengers on the aircraft. But it was a fixed number that we put on by check list. So the number

(Testimony of Edward K. Pitcher.)

of seats as far as we were concerned had no bearing on the amount of the literature that we put on.

Q. (By Mr. Riley): That I understand. However, if you don't know where the equipment is supposed to be, if you don't know where the life rafts are supposed to be and how many life jackets and where they are to be, then how do you know that you have the right literature?

A. I believe at that time we just had one type. It's called the OPF-108.

Q. You had one type of ditching pamphlet?

A. That's right. I think it's Type 108.

Mr. Riley: Would you show Plaintiffs' Exhibit 13 to the witness? [191]

The Court: That will be done.

(The exhibit was handed to the witness.)

Q. (By Mr. Riley): Is that the type of pamphlet you were just referring to, Mr. Pitcher?

A. Yes, this is the OPF-108.

Q. I understand at that time that this was the only type of pamphlet you had for installation in the aircraft.

A. We only had one type at that time.

Q. Now, at that time you were operating different types of aircraft and different configurations of DC-4 aircraft, is that right?

A. We were just operating the DC-4's over there, yes.

Q. You stated earlier, am I correct, that there were many different configurations?

A. That's right.

(Testimony of Edward K. Pitcher.)

Q. Would you refer to Plaintiffs' Exhibit 13, the pamphlet just handed you, and point out where the life rafts were shown to be stored?

A. On this particular pamphlet they were just forward of the main cabin door.

Q. Now would you show that to the Court and show the Court where the life rafts were stowed?

Mr. Riley: If your Honor please, I might inquire of the Court's procedure in this matter. I wish to illustrate to the trier of the fact—— [192]

The Court: I prefer that you proceed.

Mr. Riley: All right.

Q. (By Mr. Riley): Would you——

The Court: I would rather that he say in words so the record, if you want a transcript of it later, will show where the witness said they were on the airplane, and everyone is supposed to know, if he wants to get this information, where to put that location as described by this witness.

Mr. Riley: Very well, your Honor.

Q. (By Mr. Riley): You stated it was forward of the main door, is that right, Mr. Pitcher?

A. That's right.

The Court: Do you mean the main passenger entrance and exit door? A. Yes, sir.

Q. (By Mr. Riley): Now, how far forward, Mr. Pitcher?

A. Well, it's immediately adjacent to the door.

Q. Are those ordinarily exposed where they can be seen?

(Testimony of Edward K. Pitcher.)

Mr. Koch: Your Honor, may I have the last answer read? I couldn't hear it.

The Court: "Immediately adjacent to the door."

Mr. Koch: Thank you.

The Court: That is in substance what he said. [193] There might be some slight variation in the words.

Mr. Riley: I forgot my last question, Mr. Reporter. I'm sorry.

(The reporter read the last question as follows: "Are those ordinarily exposed where they can be seen?")

A. Not always. They're generally in a cabinet.

Q. (By Mr. Riley): Speak up, sir. I didn't hear you.

A. They're generally in a cabinet.

The Court: Is that cabinet closed by a transparent shutter or door, or——

A. No, sir; it's closed by canvas.

The Court: A solid appearing material?

A. Yes, sir.

Q. (By Mr. Riley): Is it painted any distinctive color? A. Not necessarily.

Q. Well, in most cases is it or is it not?

A. I would say it would be the same color as the interior of the aircraft.

Q. Is the cabinet marked in any way?

A. I don't recall on that type ship. I believe it was marked "Life raft" or there was "Life raft" marked over the place.

The Court: Were there on that airplane, if [194]

(Testimony of Edward K. Pitcher.)

you know, any of these collapsible, airtight, cloth life jackets that the passengers are supposed to blow up with air after putting the cloth air jacket in proper position around his shoulders and back so as to make it a floating, buoyant, balloonized object?

A. Yes, sir, there was.

The Court: Were there some of those on there?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Riley): Where are these life jackets stowed, Mr. Pitcher, in DC-4 type aircraft?

A. On that particular ship I believe they were stowed over the seats in the rack, to the best of my knowledge.

Q. Are there different stowages in different DC-4's? A. I believe there are, yes.

Q. Where else would they be stored in other DC-4's?

A. In the seat pocket immediately ahead of the passenger.

Q. Do they on any occasion store them under the seats?

A. I don't recall any under the seat.

Q. Now I'll ask you to look at Plaintiffs' Exhibit 13 which you have and read from the pamphlet that portion of the pamphlet which states where life vests will be located.

A. It says, "The life vests are located on the overhead racks or under your seat. The purser will instruct [195] you in which of the two loca-

(Testimony of Edward K. Pitcher.)

tions your life belt may be reached shortly after departure.”

Q. Now, in either place they might have been stowed could a passenger see life vests on a casual ride without looking for them?

A. If they were stowed in the overhead rack, yes.

Q. Are these in containers? Are life vests in containers? A. Yes, they're in a container.

Q. And what do these containers look like?

A. They're a canvas bag about three inches wide by eight inches by about twelve inches, roughly.

Q. Are the vests folded in them?

A. They're folded in the bag.

Q. What color are the bags that they are stowed in?

A. Oh, generally they're olive drab, I think would be the color.

Q. What color are the jackets themselves?

A. Yellow.

Q. How many different types of jackets were you using, life jackets were you using—when I say “you” I mean Northwest Airlines, Mr. Pitcher,—using in 1952?

A. I don't remember exactly. It seems to me there was just one type we were using, but the exact type I don't recall.

Q. What type does this ditching pamphlet, Plaintiffs' [196] Exhibit 13, call for?

A. It just calls for a Mae West life belt.

Q. Do you know whether or not that was the

(Testimony of Edward K. Pitcher.)

type that was stowed aboard Flight 324 when it left Seattle?

A. A Mae West is a kind of a general term. We call them all Mae Wests, and as far as I know that was the type of jacket.

The Court: Will you describe that? You might be familiar with the typical description or typical form of description of that article. Can you state the usual printed definition of it, if you are acquainted with any such definition?

A. It's printed that way here, sir. It's printed as a Mae West.

The Court: What do you understand to be its form and nature? Can you describe it and how you put it on and how——

A. I think that description was coined by the Army, sir, in a general——

The Court: I thought you could use words to say what it means.

A. I guess because it makes you look like Mae West when it's blown up. That's the only reason I know why it's called a Mae West.

The Court: Very well. You may proceed. [197]

Q. (By Mr. Riley): Well, what is a Mae West, Mr. Pitcher?

A. Well, that would be an inflatable life jacket as near as I could define one.

Q. You know what a Mae West is for, do you not? A. Yes.

Q. And why they are stowed aboard aircraft?

A. That's right.

(Testimony of Edward K. Pitcher.)

Q. Well, why?

A. Well, it's an emergency jacket in case of ditching.

Q. All right. A. At sea.

The Court: With the hope that the body with this inflated jacket will be buoyed above the surface of the water so that the passenger will not drown or will be prevented from drowning?

A. Yes, sir.

Q. (By Mr. Riley): How are these inflated?

A. By two oxygen cylinders.

Q. And how are those actuated?

A. By pulling a ring, a trigger pierces the bottle and lets the gas flow into the jacket.

Q. Now, there are a number of different types of Mae Wests, are there not, or life jackets?

A. I know of two. There might be more, I don't know. I'm only acquainted with two. [198]

Q. Were those two types in use at the time of the crash of Flight 324?

A. I don't believe they were. I think we only had the one type.

Q. What type was that?

A. The Goodyear type.

Q. And what type is the Goodyear? What does it look like?

A. When I refer to Goodyear, we have two types of literature at the present time. One is for the Goodyear type and one is for the AED, or AD type. Any of the green sacks, we call them Goodyear. I don't believe I could describe——

(Testimony of Edward K. Pitcher.)

The Court: See if you cannot——

A. The method of tying it on I think is the difference in the two.

The Court: We have spent a good deal of time on life jackets here. We have been on it a long time.

Mr. Riley: I'm sorry it takes so much time, your Honor. I hadn't examined Mr. Pitcher previously.

Q. (By Mr. Riley): At the time of our previous examination, Mr. Pitcher, there were available two different types of life rafts, is that right?

A. That's right.

Q. Were one of those types the type described in Plaintiffs' [199] Exhibit 13?

A. I don't believe I can answer that. It's not printed on the cover, and the picture is more or less of a general picture.

The Court: Is there something you can call your attention to specifically and save his time as well as that of others?

A. The picture in here is a general picture that could cover any number of different type of jackets.

The Court: Does anyone have a copy of that exhibit so you could use it while the witness is using the exhibit?

Mr. Riley: Yes, I have.

The Court: Why don't you look at that and refer his attention to such and such a place.

Q. (By Mr. Riley): I'm looking at the first

(Testimony of Edward K. Pitcher.)

diagram under the caption Prepare for Ditching, Mr. Pitcher.

Mr. Koch: Your Honor, may I interrupt the proceeding? I'm not sure, although I could be grossly in error, that the pamphlet Mr. Riley is questioning the witness from is the same one the witness is holding.

The Court: Be careful to be sure that you are not looking at something that he does not have the benefit of. You may see what he is looking at.

Mr. Riley: This is a photostatic copy of the [200] very one that Mr. Pitcher has. (Handing document to Mr. Koch.)

The Court: The Court will take your word for that. Mr. Koch, will you return it to examining Counsel?

Mr. Koch: I don't have one, so I can't tell (handing document to Mr. Riley).

The Court: You may proceed.

Q. (By Mr. Riley): What I really want to ask you, Mr. Pitcher, is, don't you know what type of Mae West or life jacket was installed on the aircraft and, if so, can't you tell us whether or not it was the same type as is described in the pamphlet you have before you?

A. Well, you're getting——

The Court: Looking at such and such a place on that pamphlet.

Q. (By Mr. Riley): Looking at the diagrams——

A. We were providing the type of ditching

(Testimony of Edward K. Pitcher.)

folder provided for at the time on the aircraft. We didn't look through the rafts, we merely provided the type of folder that was provided for it.

Q. And you have stated that this was the only type pamphlet that was available?

A. I don't know whether this is the exact one or not. It's not dated. It is similar to the ones we were using [201] at the time, yes, sir.

Mr. Riley: The document has been submitted in evidence, your Honor, as the one which was used purportedly aboard the aircraft.

Mr. Koch: Well, your Honor, I take exception to that. The witness that's on the stand is the one through whom this exhibit was introduced, and——

The Court: The objection is sustained. I do not think Counsel should make that statement at this time.

Mr. Riley: Well,——

The Court: The record will show what was done and said at the time of admission. This witness has made a statement as a witness.

Mr. Riley: I see.

The Court: You are not a witness, you see.

Mr. Riley: Yes, sir. I only wanted to clarify what was said at the time it was admitted and I didn't mean to confuse the two times there.

The Court: Very well. If you want to use that information to ask this witness another question, that is for you to decide, and the Court is not ruling on your doing that.

Q. (By Mr. Riley): Mr. Pitcher, as supervisor

(Testimony of Edward K. Pitcher.)

of equipment service have you at any time taken ditching training or [202] training to simulate conditions under which the crew and passengers of an aircraft would be exposed in the event of a ditching? A. No, sir.

Q. I'll refer once again to the diagrams illustrating the method by which you don a Mae West or put on a life jacket, or Mae West, whichever you call it, and I'll ask you to read the instructions there in the order in which they are given in English, those short paragraphs, commencing with the caption Prepare for Ditching.

A. (Reading) "Prepare for ditching. Immediately upon hearing this order—loosen your collar and tie, remove necklaces, glasses, hats, sharp pocket objects, and remove spiked or high-heeled shoes. Do not remove any other clothing. Remove life vest from compartment, keeping the yellow sea marker packet on the outside. Adjust straps so that the vest fits loosely. Do not inflate the vest at this time. Resume normal sitting position and fasten seat belt securely by eliminating all slack in it.

"The next verbal order will be 'Stand by for ditching.' Crew members for each compartment will explain the proper position to be held during the water landing. Do not move until the aircraft has come to a [203] complete stop. (Generally two shocks will be felt, the second slightly more severe than the first.)

"Unfasten seat belt only when aircraft has

(Testimony of Edward K. Pitcher.)

reached a complete stop. Remain in seat until instructed to board life raft by crew members. Do not inflate life vest inside cabin.

“Instructions for inflating life vest.

“Automatically. After leaving aircraft, pull cords with a sharp downward jerk and the belt will inflate automatically.

“Manually: In the event the life belt does not inflate automatically, detach end of rubber tubing, insert tube in mouth at the same time depressing cap with fingers and blow until vest is fully inflated.

“Life Raft Procedure. After the water landing has been completed, crew members will issue directions to your proper life raft station and will tell you how and in what order to board the life raft. At least one member of the crew will be in each life raft and will be in complete charge of his life raft until assistance arrives. Sufficient 10 and 20-man life rafts for all passengers and crew members are carried aboard all Northwest Orient transpacific aircraft. Each raft is equipped for maximum safety and for the most comfort possible.”

The Court: Do you have any knowledge as to how long normally that aircraft would remain afloat if it landed on the water undamaged in its hull?

A. I couldn't answer that, sir. That would be way out of my category. There are men who can answer that one.

(Testimony of Edward K. Pitcher.)

The Court: You are excused from answering that question.

Mr. Riley: May I have Exhibit A-15 in the pre-trial order?

The Clerk: 15?

Mr. Riley: A-15 in the pretrial order.

(The document was handed to Mr. Riley.)

Q. (By Mr. Riley): Do you recall the communication that's marked Defendant's Exhibit A-15, Mr. Pitcher? A. Yes.

Q. What is the date of that communication?

A. January 24, 1952.

Q. From whom did it come?

The Court: If you know.

A. It was from Bert Wean.

Q. (By Mr. Riley): And to whom was it addressed? A. It was addressed to me.

Q. Did you request that it be prepared?

A. Yes, sir. [205]

Q. And for what purpose?

A. I was ordered to get one made up by my superior.

Q. Who was that, Mr. Pitcher?

A. Mr. Matthews.

Q. Would you read the communication?

The Court: Which communication?

Q. (By Mr. Riley): Would you read the letter marked A-15?

The Court: This is the first time I have heard of it. Do you consider it in evidence?

Mr. Riley: Pardon me, your Honor. It is at-

(Testimony of Edward K. Pitcher.)

tached to the pretrial order. I do offer the same in evidence. It's been attached to the pretrial order by agreement of both Counsel as part of the records.

The Court: Is there any objection?

Mr. Koch: None, your Honor.

The Court: It is now admitted, Defendant's Exhibit A-15 referred to in the pretrial order, upon motion of plaintiff.

(Defendant's Exhibit No. A-15 for identification was admitted in evidence.)

The Court: And you may now read that, Mr. Pitcher.

A. (Reading) "Inter-Office Communication. Maintenance Division." Dated January 24, 1952.

"To E. K. Pitcher, Supervisor of Equipment [206] Service, Maintenance Division.

"From Bert Wean, Service Chief—Shift I.

"The following equipment was put on TWA Airlift Ship 601:

"40 Life vests in the cabin located on the overhead in the cabin and fastened with snaps, station #445.

"40 oxygen masks located in the cabin and fastened with snaps, station #445."

The first paragraph was Paragraph (a). The second was Paragraph (b). This is Paragraph (c):

"Two (2) 20 man life rafts located flush with the cabin door and are strapped in with an emergency strap buckle, station #743.

(Testimony of Edward K. Pitcher.)

“(d) Seven (7) life vests located in the buffet section, station #778.

“(e) Seven (7) oxygen mask located in the buffet section.

“(f) One (1) package of emergency clothing located in back of the two 20 man life rafts.

“(g) Seven (7) life vests are located on the bulkhead behind the companionway.

“(i) Three (3) oxygen mask are located behind the navigator's and radio desk.

“(j) One (1) 15 man life raft located at the [207] head of the companionway, station #250.

“(k) One (1) emergency radio located near the rear door, station #743.”

The Court: Is that all of it?

A. That's all of it, sir. Signed Bert Wean.

The Court: At this time we will take about a ten minute recess.

(Short recess.)

Mr. Karr: Your Honor, Mr. Koch will probably conduct all the balance of the examination of witnesses during the plaintiffs' case, so might I be excused at least at this time?

The Court: Is there any objection?

Mr. Riley: I have no objection, your Honor.

The Court: You may be excused.

Mr. Karr: Thank you, your Honor.

The Court: You may proceed.

Q. (By Mr. Riley): Mr. Pitcher, why was this report prepared by Mr. Wean?

The Court: How do you spell the name?

(Testimony of Edward K. Pitcher.)

Mr. Riley: W-e-a-n, your Honor.

A. Was it prepared by him?

Q. (By Mr. Riley): I say why was it? [208]

A. At my request.

Q. Is he the individual who stowed the gear aboard the aircraft or inspected it?

A. No, he wasn't.

Q. Why did he prepare the report, then?

A. I don't recall right now the circumstances of it. We were requested to make a chart on what was in the airplane.

Q. Do you know whether or not he was on the crew at that time?

A. He was on the crew at the time of the departure of the aircraft, yes.

Q. I see.

Mr. Koch: At the time he what?

The Court: Departure for the Orient, is that what you mean?

A. Yes, sir.

The Court: On the outbound trip or flight?

A. Yes, sir.

Q. (By Mr. Riley): Would he be the man responsible for, or would he be your man or the member of your crew responsible for the placement of the literature aboard the aircraft?

A. Yes, sir, he would.

Q. And would he also ascertain that this equipment was [209] aboard the aircraft?

A. It wouldn't be his normal duty, but he would

(Testimony of Edward K. Pitcher.)

probably look it over. We had a habit of doing that.

Q. You say "We had a habit of doing that." Were you expected to do it? A. No, sir.

Q. Now, why did Mr. Matthews ask you to make the report then?

A. Well, that I don't know. He just asked me to make it and I made it.

Q. Would you refer to Page 2 of Plaintiffs' Exhibit A-15 and tell us what it—

Mr. Riley: Does the witness have Plaintiffs' Exhibit A-15?

(The exhibit was handed to the witness.)

Q. (By Mr. Riley): —and tell us what Page 2 is?

A. It's a sketch showing the location of the life rafts and gear, and vests.

Q. Now would you tell us where the sketch shows that the life rafts are stowed?

A. Immediately aft of the main cabin door.

Q. Would you state that again?

A. Immediately aft of the main cabin door.

Q. Is there anything between the rafts and the main cabin door? [210]

A. I don't recall whether there was on that ship or not.

Q. Well, what does the diagram say?

A. Oh. A snap curtain.

Q. And what type snap curtains did you have in DC-4 aircraft?

(Testimony of Edward K. Pitcher.)

A. I don't remember the exact description of the curtains on that airplane.

Q. Well, in general?

A. In general on the DC-4 aircraft just a heavy curtain with snaps that come loose with a jerk.

Q. How many snaps would there be?

A. I wouldn't have any idea.

Q. Would you be able to see the life raft behind the curtain?

A. I don't remember on that one whether the curtain closed all the way down the aisle or not. There was evidently one on the main cabin door side. Some of them closed and some of them didn't.

Q. Now, what is the difference between the location of the rafts here and in the manual that you referred to yesterday and in Plaintiffs' Exhibit 13, the ditching pamphlet which you stowed aboard the aircraft?

Mr. Riley: Does the witness have Plaintiffs' Exhibit 13, the ditching pamphlet, and Plaintiffs' Exhibit 12? [211]

(The exhibits were handed to the witness.)

A. In this one two of them are forward the cabin door and one is opposite the cabin door.

Q. Now would you explain that please, Mr. Pitcher, before you release Plaintiffs' Exhibit 12, in any of the three configurations are the life rafts aft of the main cabin door? In any of the three configurations in Plaintiffs' Exhibit 12, which is the operations manual for Northwest Airlines for

(Testimony of Edward K. Pitcher.)

DC-4's, are life rafts stowed behind the cabin door, the main door?

A. Not on this Northwest one, no, sir.

Q. All right. Now, where in the ditching pamphlet which is Plaintiffs' Exhibit 13 does the diagram show that the life rafts are placed in the main cabin?

A. In this one, forward.

Mr. Koch: I couldn't hear the answer.

Q. (By Mr. Riley): State that again, please.

The Court: "In this one, forward."

A. Forward.

Q. (By Mr. Riley): Incidentally, who drew this sketch, Mr. Pitcher, attached to Plaintiffs' Exhibit A-15?

A. I drew the sketch.

Q. And when did you draw that sketch, sir?

A. It's dated January 24, 1952. [212]

Q. What year again, sir? I can't hear you.

A. January 24, 1952.

Q. Thank you. Now, the notation on the bottom says, "TWA 543-601." Would you explain that, please?

A. I don't recall what that number was, Ship 601.

Q. Well, what does the number 601 mean, sir?

A. I believe that would be the company designation for that ship. I'm not sure.

Q. Now, was this sketch a sketch of the aircraft that was used in Flight 324? I mean I'm referring to the drawing that you prepared on January 24, 1952, that was submitted to your supervisor, Mr. Matthews.

A. Yes.

(Testimony of Edward K. Pitcher.)

Q. Is there any reason to question the diagram as to the placement of life rafts in the main cabin?

A. No. That's where they were.

Q. What else is located in the after compartment where these life rafts were stowed?

A. The emergency gear and the Gibson girl.

Q. What other facilities are located in the after compartment aside from the emergency equipment you have just described?

A. Oh, after that was the coat compartment.

Q. Anything else back there?

A. Just the lavatories. [213]

Q. Now with reference to these two rafts, what type of rafts were they, Mr. Pitcher?

A. 20-man rafts.

Q. And would you tell us how much they weigh?

A. I would have no idea on that.

Q. Do you have any idea whatsoever?

A. Oh, I can make a wild guess. I can pick them up. They weigh probably about 125, somewhere in that vicinity, but it would be just a guess on my part.

Mr. Koch: Your Honor, I move that the answer be stricken. The witness doesn't know and admits that he is just making a guess.

Mr. Riley: Well, I think that he should know. He's seen the rafts.

Mr. Koch: He said he doesn't know.

The Court: The motion is denied.

Q. (By Mr. Riley): Are these rafts used in your operations, in Northwest operations here at

(Testimony of Edward K. Pitcher.)

Seattle all the time? A. Yes, sir.

Q. Have you seen them? A. Yes, sir.

Q. Have you ever lifted them? A. Yes.

Q. What would you estimate the weight to be?

A. I'd say around 100, 125 pounds. [214]

The Court: Is that the same article you were asking about before Mr. Koch's objection?

Mr. Riley: Yes, sir, it was.

The Court: He had already answered it.

Mr. Riley: I'm sorry, your Honor.

The Court: And he stated his reasons for it.

Q. (By Mr. Riley): Are there any other rafts stowed in the aircraft according to your sketch, Mr. Pitcher?

A. There's another one stowed up by the cockpit.

Q. In what compartment is that life raft stowed?

A. Well, as near as I could say it would be the crew compartment.

Q. Now, what is located in the crew compartment?

A. Just aft of the cockpit where the radio and the navigation table and the crew berth are.

Q. What type of life raft was stowed in that compartment, sir? A. A 15-man.

The Court: One that was calculated to sustain in the water fifteen persons?

A. Yes, sir.

The Court: Adult persons?

A. Yes, sir.

(Testimony of Edward K. Pitcher.)

Q. (By Mr. Riley): I note—incidentally, the two 20-man rafts in the main cabin, how are they held in place or [215] secured?

A. By a quick disconnect web belt.

Q. Now I note the one in the forward compartment is not tied down. Is that true according to your sketch?

A. According to the sketch, yes, sir.

Q. Do you have any idea what would happen to that raft in the event of an impact such as an airplane ditching in the water?

A. I don't recall the reason for not tying it down, unless it was in some kind of a compartment where it didn't require tying down.

Q. I couldn't hear you, sir.

The Court: Read the answer, Mr. Reporter, if you can locate it quickly.

(The reporter read the last answer.)

Q. (By Mr. Riley): Well, you didn't answer my question, Mr. Pitcher. What would happen to the life raft if it were not tied down and the airplane crashed into the water in ditching?

A. That I don't know.

Q. Haven't you any idea?

A. No, I haven't.

Q. Are these life rafts buoyant? Will they support themselves without being inflated in the water?

A. That I don't know. I've never seen one put in the [216] water without being inflated.

Q. There isn't any other emergency equipment stowed aboard the aircraft according to the com-

(Testimony of Edward K. Pitcher.)

munication that you and Mr. Wean forwarded to Mr. Matthews then, is that correct?

Mr. Koch: Your Honor, the question is very leading.

The Court: Try to avoid leading, if you can, until the witness shows there is some reason for leading.

Mr. Riley: Very well, your Honor.

Q. (By Mr. Riley): The report rendered to you from Mr. Wean and in turn to Mr. Matthews, can you state whether or not there was any other—I'll strike that.

Can you state whether or not there was any other emergency equipment located or placed aboard Flight 324, that is Ship 601, when it left Seattle other than the materials described in your report and Mr. Wean's report to Mr. Matthews which is Plaintiffs' Exhibit A-15?

A. I wouldn't know.

Q. Would you have included it on your report had there been any others?

Mr. Koch: Your Honor, I object to that because this isn't his report. It was prepared by [217] Mr. Wean.

Mr. Riley: I believe he stated it was his responsibility and that he asked Mr. Wean to prepare it and that he submitted it to Mr. Matthews.

The Court: The objection is overruled.

Q. (By Mr. Riley): Do you remember the question, sir?

A. Wasn't it about other emergency equipment?

(Testimony of Edward K. Pitcher.)

Q. Had there been any other emergency equipment loaded aboard the aircraft would you not have included—strike that.

Mr. Riley: Mr. Reporter, could you read the last question back?

The Court: That will be done.

(The reporter read the question back as follows: “Would you have included it on your report had there been any others?”)

Mr. Koch: Your Honor, I wish to renew my objection to that because it is obvious from this exhibit that there are things set forth in the letter from Mr. Wean and different things, certain different things set forth in Mr. Pitcher’s sketch, and so to inquire whether everything is included in Mr. Wean’s letter when there are other things not in Mr. Wean’s letter that appear in Mr. Pitcher’s sketch is [218] misleading and improper, in my opinion.

Mr. Riley: I don’t think that shows at all, if your Honor please. I don’t know what Mr. Koch refers to, but——

Mr. Koch: Well, I refer, for example, to the Gibson girl which is listed on—I don’t know if it’s listed, but Mr.——

Mr. Riley: The Gibson girl is Item (k).

Mr. Koch: ——Mr. Pitcher testified to it. Beg pardon?

Mr. Riley: The Gibson girl is Item (k) in the letter.

Mr. Koch: It hasn’t been so identified.

(Testimony of Edward K. Pitcher.)

Mr. Riley: That may be true, but I didn't know it.

Mr. Koch: I'll withdraw my objection, your Honor.

The Court: Proceed.

A. As far as I know this was all the information that Mr. Matthews required.

Q. (By Mr. Riley): You still haven't answered my question, Mr. Pitcher. I want to know whether or not you would have included other emergency equipment had it been loaded aboard the aircraft in this report.

A. I don't get what you mean by "other emergency equipment." [219]

Q. Flares, flashlights, Very pistols,—

A. Oh, we would not have included that. This only concerned the life rafts, jackets and the flotation equipment and oxygen equipment.

Q. Don't you consider that those are as much emergency equipment as life rafts?

A. Well, that is not my category, that's not my job. I supplied the information that was requested and it's all on the paper here. It probably is not a complete list.

Q. What is a Gibson girl?

A. It's an emergency radio transmitter.

Q. If it's not your job to inspect the aircraft, and you have stated that it was your practice to see that the emergency equipment was located aboard the aircraft whose job was it to see that flares and

(Testimony of Edward K. Pitcher.)

pistols and emergency lighting flashlights were placed aboard the aircraft?

A. That was taken care of by the mechanics.

Q. But you have stated that it was your practice to see that it was placed aboard the aircraft and that it had everything from hairpins and safety pins, in your own words, Mr. Pitcher, to toilet paper, if I recall correctly. Isn't emergency equipment equally important to those items? [220]

A. It wasn't our job to install them.

Q. Well, then whose job was it?

A. It was installed by the mechanics.

Q. What mechanics? What department or what portion of the mechanical department?

A. The mechanical department.

The Court: The mechanical department.

Mr. Riley: Thank you, your Honor.

Q. (By Mr. Riley): Who in the mechanical department at Northwest Airlines in Seattle in January, 1952, would be required to see that the aircraft had flares and flashlights and emergency lighting aboard the aircraft?

A. That I don't know. It could be any number of—

The Court: Name some of them that could be, if you know.

A. I wouldn't even know, sir.

The Court: Who is the head of the department, if you know?

A. Mr. Matthews.

(Testimony of Edward K. Pitcher.)

The Court: Mr. Matthews is the head of the department. Does he have any assistants?

A. Yes, sir.

The Court: Name some of them, all of them that you know.

A. He has a number of foremen, and—— [221]

The Court: State if you know their names or so many of them as you do know, if there are any.

A. Oh, there's Jerry Whittle, and——

The Court: Jerry Whittle. Who else?

A. Bill Hewitt.

The Court: H-e-w-i-t-t?

A. I believe so, yes, sir.

The Court: Anyone else?

A. Frank Cavanaugh.

The Court: Anyone else?

A. Mr. Thompson.

The Court: If you think of any others, name them, will you?

A. There's one other, but I can't recall his name at the moment.

The Court: You may inquire.

Q. (By Mr. Riley): Mr. Pitcher, how do you know that your responsibilities have been fulfilled before an aircraft leaves, your department, are reports prepared on each individual flight?

A. There's a check sheet that we check off as we put on the supplies.

A. Who is we? A. My department.

Q. Was such a check sheet prepared for Flight 324? [222]

(Testimony of Edward K. Pitcher.)

A. It probably was, yes, sir.

Q. Would you have referred to it when you prepared this memorandum of January 24th?

A. This stuff wasn't on our check sheet.

The Court: Could you answer the question? Read the question.

(The reporter read the last question.)

A. No.

Q. (By Mr. Riley): Does your check list have on it flares, flashlights and emergency equipment of any kind? A. Only the ditching folders.

Q. Was such a report rendered in the case of Flight 324 when it left Seattle in January of 1952?

A. Did we use that check sheet?

Q. Yes. A. Yes.

Q. Was such a report prepared in your department? A. Yes.

Q. Do you have it there now?

A. No, those records are not kept for over a week.

Q. How long are they kept?

A. Only about a week.

Q. Even in the event an airplane crashes you don't keep the records?

A. Not those check sheets, they never were kept.

The Court: Read his answer so that those present can hear it against that conflicting street noise.

(The reporter read the last answer.)

Q. (By Mr. Riley): Do you know whether or not those check sheets were kept after the crash to

(Testimony of Edward K. Pitcher.)

see whether or not the aircraft had been properly supplied?

The Court: Answer yes or no.

A. I don't recall, sir. I don't remember.

Q. (By Mr. Riley): You have no idea whether or not you ascertained that your job had been fulfilled with relation to Flight 324 after it crashed?

Mr. Koch: I object to the form of the question, your Honor.

The Court: The objection is sustained. You could ask him "Do you have any idea" if you wanted to.

Q. (By Mr. Riley): Do you have any idea whether or not you checked your records to see whether or not Flight 324 had been serviced in accordance with your responsibility?

Mr. Koch: I object to that, too, about in accordance with his responsibility.

The Court: The objection is overruled.

A. Yes, I did. [224]

Q. (By Mr. Riley): And what did you determine?

A. That as far as our part of it was concerned we were all right.

Q. What do you mean by that?

A. That the proper literature was aboard the aircraft.

Q. Are you testifying now that this was the proper literature for that aircraft?

A. That the proper literature at the time was put on, yes, sir.

Q. Now, what do you mean by "proper"?

(Testimony of Edward K. Pitcher.)

A. That the literature provided for at the time was on the airplane.

The Court: When was it on the airplane?

A. It was placed on the airplane prior to the time it left Seattle.

Q. (By Mr. Riley): Now would you state once again whether or not the literature you placed aboard the aircraft was for the type of DC-4 that left?

The Court: On this flight.

Q. (By Mr. Riley): On this flight.

A. Yes, it was.

Q. Is that right when the—can you say that that is correct when the life rafts stowage as indicated on the ditching pamphlet is different than was actually the case in this particular aircraft? [225]

A. I think—

Q. Answer that, please, yes or no.

A. I don't know on that one. I couldn't answer that because I'm not sure of the type of literature that was put on. I don't recall the type.

Q. Now I'd like to make that clear. Do you know whether you had the proper literature aboard or not?

A. We had the literature that we had at the time. I just don't recall what it looked like. It's too long ago.

Q. Well, did you check after the crash or did you not to see whether or not the proper literature was aboard the aircraft?

A. I checked with the chief, yes, to make sure

(Testimony of Edward K. Pitcher.)

that all the stuff we had to put on was on, the literature was on.

Q. Was the literature that you placed aboard the literature that you have before you, Plaintiffs' Exhibit 13?

A. I couldn't say for sure because I don't recall the exact kind. There's been a number of modifications in that, or revisions, I should say.

Mr. Riley: I have no further questions, your Honor.

The Court: Any further questions? Have you in mind the possibility that the defendant may call this witness as one of the defendant's witnesses? [226]

Mr. Koch: I would like to conduct a brief examination, your Honor.

Cross Examination

Q. (By Mr. Koch): Mr. Pitcher, will you again state exactly what your job was for Northwest Airlines in January of 1952?

A. I was supervisor of equipment service.

Q. And you're that today? A. Yes, sir.

Q. Will you briefly describe the duties of your position?

A. Loading and unloading of aircraft, cleaning and supplying such items as are necessary for passenger comfort.

Q. Does cleaning refer to cleaning out the cabin and cleaning out the lavatories and that sort of thing?

(Testimony of Edward K. Pitcher.)

A. Yes, sir. That cleans the airplane from one end to the other inside and outside.

Q. And when you say "supplying", what are the supplies that are within the equipment services which your department provided?

A. Anything for the passenger comfort and convenience and for the use of the stewardess, such as forms, papers, literature and medicines, and so forth, that she would need in flight. [227]

Q. What are the things normally provided for the passengers' comfort? Are you speaking now of such items as food?

A. We also put on the food, yes, sir.

Q. You put on the food, you stocked the lavatories, is that correct?

A. That's right, berths, sheets, linen, magazines.

Q. That's under the category of Services?

A. Yes, sir.

Mr. Riley: If your Honor please, I'm going to state an objection at this time because although I've been restricted from leading the witness, even though he is now cross examining—

The Court: That objection is sustained, and the last question is leading and so it is sustained as to that. Avoid leading the witness. You can ask him to name what items or articles are included in those things, if you wish.

Mr. Koch: Your Honor, I wasn't trying to take advantage of the situation.

The Court: I realize that.

(Testimony of Edward K. Pitcher.)

Mr. Koch: It was really by summary, but I thought we could cover it rather rapidly. I'm sorry if I infringed.

Q. (By Mr. Koch): Will you name the supplies that were [228] within your jurisdiction?

A. It would take quite a catalogue, but——

Q. Just by categories, so we can get a general idea of what you did have.

A. Oh, magazines, all types of medicines, bandages, diapers, air sickness containers and hand towels, almost anything that a passenger would ask for in the airplane, soap, cigarettes.

Q. Did you handle such supplies as emergency gear? A. No, that was not our job.

Q. Were there any types of emergency gear or paraphernalia that was within your job?

A. Only the literature.

Q. And is Plaintiffs' Exhibit 13, that folder, within the literature that was within your department?

A. This is the type we supplied the airplanes, yes, sir.

Q. That was one of your department's responsibilities? A. Yes, sir.

Q. Within what department's responsibility would the emergency gear such as the life vests, masks, emergency clothing, life rafts, Gibson girl, fall?

A. That's installed by the mechanical department.

(Testimony of Edward K. Pitcher.)

Q. What department is in charge of servicing that type of emergency gear?

A. The mechanical department. [229]

Q. Does that include restocking the plane with such gear? A. Yes, sir.

Q. Now, you have testified concerning Plaintiffs' Exhibit No. 12, which is a group of manual provisions of the defendant Airline. Do you have that exhibit before you? A. Yes, sir.

Q. Will you examine that exhibit and tell me the types of airplanes to which it refers?

A. This is a DC-4 type.

Q. Then are all Northwest Airlines DC-4's covered by the provisions of those manual pages?

A. That I couldn't answer. I'm not acquainted with all the types.

Q. Do you know whether that exhibit covers aircraft not owned by Northwest Airlines but leased by them from other air carriers?

A. No, these are all Northwest.

Q. Northwest owned planes, do you mean?

A. (Witness nods his head.)

Q. Now, in Exhibit A-15, which is the letter from Mr. Wean to you and a sketch attached, does this letter and sketch refer to planes owned by Northwest Airlines?

A. No, sir. This is a TWA plane.

Q. TWA, is that what the reference is at the bottom of the [230] sketch, "TWA 543-601"?

A. Yes, sir. That would be the ship number.

Q. The ship number of TWA planes. Are the

(Testimony of Edward K. Pitcher.)

interior arrangements—I think Mr. Riley has referred to them as configurations—the same on the TWA planes as they are on the Northwest Airlines DC-4's? A. Not exactly.

Q. You say they are not exactly the same?

A. No, they're not.

Q. When Northwest Airlines leases a plane such as TWA Ship No. 543-601, do you know whether it is the practice of the company to make——

Mr. Riley: I object to the question. He's obviously not qualified to answer it.

Mr. Koch: Your Honor,——

The Court: If he knows.

Mr. Koch: It's within the scope of the direct examination.

The Court: Just ask him if he knows.

Q. (By Mr. Koch): Do you know whether Northwest Airlines conforms the leased TWA planes to be standard with the Northwest Airlines planes in the arrangements, in the configuration in the cabin?

A. As far as the cabin goes, that's the only part I could answer for. They were not the same as ours.

Q. Were they made the same after Northwest Airlines took possession of the planes under the lease? A. No, not that I know of.

Q. They were checked?

A. Of course I don't know, they came out to Seattle here, but I don't know what they did or anything like that.

(Testimony of Edward K. Pitcher.)

Q. When they came out to Seattle were they still different from Northwest Airlines DC-4's?

A. Oh, yes.

Q. Do you know whether those differences were brought to the attention of the crews of the TWA planes?

A. Oh, we had supplemental bulletins to the manual on that.

Q. Supplemental bulletins that what?

A. To the manual on that.

Q. Supplemental bulletins to the manual?

A. Describing the type of airplane, yes.

Q. That would cover — do I understand that those supplemental bulletins would be added to the manual and would apply only to certain planes?

A. I believe so.

Q. Is there a supplemental bulletin attached to the manual pages which are Plaintiffs' Exhibit No. 12?

Mr. Riley: I think he's gone beyond the scope of the direct examination, if the Court please. [232]

The Court: It begins to look that way.

Mr. Koch: Your Honor, this is exactly the subject matter that was covered yesterday afternoon. I can read the questions to the——

The Court: All right. Read one of them, will you?

Mr. Koch: All right, sir.

The Court: I wish you to have in mind that if you go into the subject now the Court will not wish you to go into it again if you later find an occasion

(Testimony of Edward K. Pitcher.)

for recalling this witness. You would have the right to go into it fully with this witness as your own witness. If now you go into part of it and save part of it, you are running the risk of wanting to go into it the second time, but you may proceed.

Mr. Koch: Your Honor, my intention, so the Court will not think that I'm misusing the time here, is to use this witness today and not to recall him. If there is further testimony on this subject I anticipate that it will come from other witnesses, so I'm questioning him now because I do not intend to recall him.

The Court: You may proceed, within the scope of the direct examination.

Mr. Koch: You asked that I mention sample [233] questions from yesterday afternoon, your Honor.

The Court: That is sufficient. I just wished you to refer to them. The objection is overruled. I just wished you to refer to them and make sure that that is the case. The objection is overruled.

Mr. Riley: If your Honor please, one of the objections that Counsel had to the subpoenas duces tecus was that they couldn't compile the records and their manuals as of January, 1952, that it was an unduly onerous burden, and the subpoenas duces tecum to which they state they have purportedly complied and to which their company complied by delivering to him these documents which are now on Counsel table and from which this exhibit was taken were records of their operations manual at that

(Testimony of Edward K. Pitcher.)

time, and it seems to me that we're being placed in a very difficult position because they have purported to have complied with that when those documents were ordered produced earlier and they now come in and attempt to examine with relation to documents which they have not produced and which they did not deliver pursuant to the subpoena duces tecum, and I think it's unfair to the plaintiffs.

The Court: What is the situation?

Mr. Koch: Your Honor, the materials that we have supplied are those which the plaintiff has [234] requested from defendant in a series of ways. We supplied a great number of materials through a motion to produce. We supplied additional materials voluntarily because the plaintiffs asked us to give them specific things. We gave them particular manual pages which they asked us to give.

Now, the particular issue here, your Honor, didn't become an issue until yesterday morning when the Court permitted the plaintiffs to amend the pleadings. At that point the plaintiffs stated that the emergency gear was not supplied as it should have been and was not put where it should have been put and in various respects didn't comply with Civil Aeronautics rules and regulations, and in an attempt to prove that Mr. Riley through witnesses in whose jurisdiction the matters in question do not fall has elicited information and has put in evidence inspection pages which refer to particular aircraft.

They asked for the manual pages, we gave them the manual pages. There are additional supple-

(Testimony of Edward K. Pitcher.)

mental pages that govern craft that have been leased by Northwest Airlines and don't fall within the normal Northwest Airlines operating procedures. I've never seen them, I don't now have them. They didn't become an issue until this point was raised yesterday. [235]

The Court: On that point, what response do you have to that last observation, that they did not become an issue, and I take it he means were not covered by any demand you made previously for production, nor did they become material until the pleadings amendment of the beginning of this trial?

Mr. Riley: I'm looking first of all to the original subpoena which was served.

The Court: Read silently the description of the material sought in that subpoena.

Mr. Riley: And in later subpoena duces tecum what I asked for was, "All applicable components of the Northwest Airlines manual and Northwest Airlines DC-4 operating manual and Northwest Airlines maintenance manual as maintained by Northwest Airlines on or about January 19, 1952."

Now, back in February when I took Mr. Peterson's deposition I subpoenaed those documents just in that form, and we came in here some time ago on a motion to comply with the subpoena and I was informed that they would produce those, and these are the documents that were produced.

Now I'm going back to try to find my original subpoena so I can direct your Honor's attention to that, which is in the court file. I didn't ask for

(Testimony of Edward K. Pitcher.)

[236] any particular manual pages. I had absolutely no way of asking for particular pages because I had never seen them before and I had to describe them generally.

The Court: Is your objection confined to particular pages of the manual book?

Mr. Koch: Your Honor, the Court ruled just yesterday, I believe it was, or perhaps the first day, that we wouldn't be required to decide which were the applicable pages. It's almost impossible for us to go through eight or ten different manuals and decide which are the pages that the other side will consider material to this lawsuit, and the Court specifically said that that request would have to come from the plaintiffs, that it wasn't for the defendant to determine what were the relevant or the applicable pages.

Now, this is a perfect illustration of why——

The Court: The book itself, though, why was not the subpoena sufficiently broad enough to cover the book that contains the material you now speak of?

Mr. Koch: It isn't in any book, your Honor. These pages are maintained currently and the obsolete pages are removed from time to time.

The Court: I thought you were making the point that separate pages were not described. [237]

Mr. Koch: They asked us to produce—I am making that point. They asked us here within the last week to reproduce as of January of 1952 the manuals as they then existed. That's an impossible burden. But as the points have become issues in the

(Testimony of Edward K. Pitcher.)

case we have obtained and had printed up from old plates that the company has retained excerpts that were applicable at that time.

Now, Mr. Riley has never asked for this specific material. He's asked for it in general terms, as he acknowledges. We couldn't possibly know that this issue would become relevant until Mr. Riley made it an issue yesterday by amending his pleadings.

The Court: I am just a little bit inclined against that construction of it. Mr. Riley, as I understand, had a right to and was seeking anything that is related to this subject, and I doubt if he was required to be so specific as to do this, and if I thought the penalty should be that you not be permitted to use this material now I would be inclined to sustain the objection, but I would like to hear further from Mr. Riley on that.

Mr. Riley: Well, our problem is, as your Honor can appreciate, that we having served on the airline a number of subpoenas duces tecum directed to [238] the airline and to the airline through these individual officers directing them to produce these various records, their company manuals, and so forth, and the defendant resists those and has moved to quash them, and as I understand the Court's order, with which we are now bound, that we have to work with only those documents that he has chosen to deliver so far and those documents alone, and we have subpoenaed them, and it just seems to me to be giving the defendant—

The Court: I think so, and I think you ought to

(Testimony of Edward K. Pitcher.)

submit those to him before you go on with this. You may reserve your question, but submit those documents that you——

Mr. Koch: Your Honor, I don't even have them. I don't have them. I'm just bringing out from the witness that they do exist. This just came up yesterday afternoon and we're now attempting to get them, but I don't have anything that I'm withholding, your Honor.

Mr. Riley: If the Court please, this did not just come up yesterday afternoon. The first time I served a subpoena on this was in February, and it was served on Mr. Peterson and he was required to attend a deposition and was asked to produce those [239] documents.

Mr. Koch: What documents?

Mr. Riley: It was again served——

The Court: The documents of the classification you are now speaking of——

Mr. Koch: Your Honor, that's where the difference of opinion is. We have attempted to give everything we had. The language in which they have been requested didn't make possible an exact determination. I would like Mr. Riley to read the paragraph of any subpoena that he has which he thinks covers the material that is involved now.

The Court: Read that one more time.

Mr. Riley: "All applicable components of Northwest Airlines manual and Northwest Airlines DC-4 operating manual and Northwest Airlines mainte-

(Testimony of Edward K. Pitcher.)

nance manual as maintained on or before January 19, 1952.”

That identical language was used first in February in a subpoena served, as the court file will show, on Mr. Peterson for the purposes of deposition; again on March 7th to the airline through the statutory agent for process, and later directed to Mr. Middlestat and Mr. Curry.

Mr. Koch: Your Honor, these were all served within the last few days. That very paragraph that [240] Mr. Riley is reading to you from was in a subpoena which he served on March 20th or 21st, I'm not sure of the exact date, requesting all applicable components of manuals which are five years old. At that point if we hadn't already provided it, and we thought we had, it was absolutely impossible to revise current manuals to a status of five plus years ago. We thought that we had complied by giving him the material as we have gone along in great quantities. It's all here, and——

The Court: Mr. Koch, if you have any of that material now or if you think by conferring with this witness in private you could get some more material that you have not supplied to him up to this time, the Court directs that you suspend the examination of this witness on that point now. After discussing the matter with this witness or anyone else, locate that other material and submit it to Counsel under that subpoena, so he will know what it is before he proceeds.

(Testimony of Edward K. Pitcher.)

Mr. Koch: I don't know that we have it, your Honor. We've sent for it, but——

The Court: The objection is sustained. You have leave to suspend your examination of this witness on this point until you've had an opportunity to [241] discuss it further with him or somebody else and see if you can locate any papers, and if you do, surrender them to the plaintiffs' Counsel, after which the Court will give you further opportunity to inquire of this witness if you do that within a reasonable time and before the defendant's case in chief is rested.

Mr. Koch: The papers have been located, your Honor. They are being flown out here, and as soon as we get them we will comply with the Court's direction.

The Court: Do that. You will suspend this inquiry until Counsel gets a chance to see what you may have now or hereafter. I wish you to make a careful note of this. I do not wish to have a long discussion in the future about what we were talking about. Will you mark your subpoenas about what material is covered, and Mr. Koch, I ask you to so identify the material so that we will not have any long, extended discussions about the identity of it. You may now ask him some other questions on some other subject other than this particular subject.

Q. (By Mr. Koch): Mr. Pitcher, on direct examination you testified on two types of Mae West jackets, life vests, which were made by different

(Testimony of Edward K. Pitcher.)

companies, but were they [242] both of the same general type, do you know?

A. They're both the same general type, yes.

Q. Both the vest type?

A. Well, they're both what I'd call a Mae West, yes.

Q. But with armholes that go through each arm and tie? A. That's right, and tie straps.

The Court: With a tie strap in front after extending downward from the armpits or from the back across the midsection of the torso, human torso?

A. Yes, sir.

The Court: Frontwards, and with long enough ties on them that they can be brought together in front and tied?

A. Yes, sir.

The Court: Or snapped in some manner?

A. Yes, sir.

Q. (By Mr. Koch): And were they both inflated by pulling that ripcord? A. Yes.

Q. They inflate automatically, is that correct?

A. Yes.

Q. Did I understand you to testify that in January of 1952 only one of these types was then in use by the defendant?

A. As far as I know there was. [243]

Q. Does the description in Plaintiffs' Exhibit 13, the folder, cover the type of vest that the company was using at that time?

(Testimony of Edward K. Pitcher.)

A. This is more or less just a general description. It would cover it at that time, yes.

Q. Now, there was some confusion over the folder, Plaintiffs' Exhibit No. 13. Was it your testimony that you did not know whether this particular folder was the folder which the company was using in January of 1952?

A. Yes, sir.

Q. Why is there that uncertainty in your mind?

A. This folder has been revised a number of times since I've worked for the airline, and I don't know just exactly which revision was in use at that particular time.

Q. Was the folder that was in use at that time, was there more than one folder which was in use at that time?

A. I think there was only one folder in use at that time.

Q. Did that folder apply to all over water flights of the defendant?

A. We used them on all over water flights, yes, sir.

Q. Would there be any possibility that the crew would—strike that. Does Plaintiffs' Exhibit 13, the folder, set forth the location of emergency equipment in the diagram? [244]

The Court: Diagram showing what part of the airplane?

Mr. Koch: Of the interior of the cabin, your Honor.

A. In general, yes.

Q. (By Mr. Koch): Was there any method for

(Testimony of Edward K. Pitcher.)

informing the passengers of any respects in which the location of emergency gear——

Mr. Riley: I object to that question.

Mr. Koch: I haven't finished it yet.

The Court: Do not answer the question until Counsel finishes the question.

Q. (By Mr. Koch): ——in which the information on the emergency gear differed on a particular aircraft?

Mr. Riley: I object because he's stated what his capacities are. He didn't have anything to do with the passengers.

Mr. Koch: I haven't asked anything about the passengers, your Honor. The question is directed to what if anything the company did to explain the use and purpose of the folder.

Mr. Riley: I ask that the question be re-read.

The Court: Will you read—I got the impression that other than that folder which he calls [245] literature he had nothing and his department had nothing to do with instructing passengers. I think he said that many times, has he not?

Mr. Koch: I think he has said that.

The Court: Will you read the question.

(The reporter read the last question as follows: "Was there any method for informing the passengers of any respects in which the location of emergency gear—in which the information on the emergency gear differed on a particular aircraft?")

The Court: The objection is overruled.

(Testimony of Edward K. Pitcher.)

A. I believe there is, but it's not my department that advises them.

Q. (By Mr. Koch): Well, if you know will you tell us what it was?

A. You mean who would advise the flight crews on the location of the emergency equipment? That would come from their department heads.

The Court: He asked you can you give the information which those department heads would impart or cause to be imparted, if you know what it was, if you have a reasonable belief that you know what it is. [246]

A. There would be a bulletin issued on it that they all get.

The Court: Who all would get?

A. The flight crews and the various ones concerned with it.

The Court: Would the passengers get it? That is what I believe is involved, is it not?

Mr. Koch: Yes, your Honor.

The Court: State if you know, would the passengers get it?

A. I don't know.

The Court: Do not state if you do not know it, but if you do, give it.

A. I don't know. That's way beyond me.

The Court: Very well. Ask him something else. We will close at about 4:30 or a little before if you get through.

Mr. Koch: Thank you, your Honor.

Q. (By Mr. Koch): Do you know whether

(Testimony of Edward K. Pitcher.)

flares, flashlights and that type of equipment were actually standard equipment on Northwest Airlines overseas DC-4's?

A. I have nothing to do with that stuff.

Q. You don't know if they were on board the craft or not? A. No.

Q. Referring, Mr. Pitcher, to Plaintiffs' Exhibit A-15, [247] the sketch, and noting the location of two 20-man life rafts and the snap curtain, is the snap curtain a curtain that's across the door?

A. You mean the——

Q. The passenger door.

A. No, that was not the main cabin door.

Q. Well, do you see where the words read "Main Cabin Door"? A. Yes.

Q. The little line with the arrow sticking out looks like the door is partly open. Is that correct?

A. Yes.

Q. Where in terms of the door is this curtain?

A. It would be just to the right as you step in the cabin.

Q. At right angles to it?

A. Right across the ship, yes, at right angles.

Q. It would be to your right as you entered the cabin of the plane? A. That's right.

Q. What would be above this curtain, if you know?

A. I believe that curtain was attached to the overhead. I'm not sure, but it seems to me that that was attached to the overhead.

The Court: That is not exactly responsive. If

(Testimony of Edward K. Pitcher.)

you know, what if anything would be placed above [248] that curtain? That does not call for any comment on the curtain. That is already assumed. Everybody for the purpose of this question has lost interest in the curtain.

A. What would be above the curtain?

The Court: Yes.

A. There would be nothing above the curtain.

The Court: That answers the question.

Q. (By Mr. Koch): Where in relation to the curtain are the life rafts?

The Court: If you know.

A. They were in back of the curtain.

Q. (By Mr. Koch): They were behind the curtain? The curtain covered the life raft?

A. Yes.

The Court: Those connected with this case are excused until tomorrow at ten o'clock and may now retire. Be back here at that time for further interrogation.

Mr. Riley, I wish you would have a very clear and concise list of all the records of every name and nature that you have asked for in the past and have that list so you can very readily refer to it in case you anticipate the possibility of making an objection in the future to the use by defendant or inquiry by [249] defendant concerning any records not disclosed.

Mr. Riley: Thank you, your Honor, I will do that.

The Court: I wish Counsel on both sides to know

that this Court is one, among many others I suspect, who believes that the very heart of the discovery procedures is the motion for production of documents and that it should be in the greatest liberality instead of the greatest illiberality complied with. The requirements and provisions of the rule ought to be complied with by both sides, and I wish you to both be very certain that you do so in this case because this case is one case, a good case to show the need for the use and the wisdom of the use of certainty and very definite dealing in connection with the records.

Those connected with this case are excused until tomorrow morning at ten o'clock.

(Thereupon, at 4:30 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Thursday, March 28, 1957.) [250]

Seattle, Washington

Thursday, March 28, 1957, 10:00 o'clock a.m.

(All parties present as before.)

The Court: All are present. You may proceed.

Mr. Riley: If your Honor please, I would like permission to proceed without Mr. Murphy, who is engaged with a witness who has come to Seattle last night from Alamogordo.

The Court: Mr. Murphy is associate Counsel who has been sitting at Counsel table with you, is that right?

Mr. Riley: Yes, your Honor.

The Court: That is agreeable to the Court. You may proceed.

Mr. Riley: I wish to make an apology to the Court and to Counsel for a partially erroneous statement I made last evening relating to the subpoenas which I stated to the Court had been issued to the defendant airlines, in the language which I cited to your Honor, wherein I stated that I had subpoenaed as early as in February all applicable components of Northwest Airlines manual, Northwest Airlines DC-4 operating manual and Northwest Airlines maintenance manual as maintained by the defendant on [251] or about January 19, 1952, I was under an apprehension, and an honest one, if the Court please, that I had used that language at the time I subpoenaed Mr. Peterson for a deposition in February, and on reviewing my records I find that that was incorrect. I did not use that language until this month after the 12th. I didn't conform my copies of the subpoenas, so I'm not actually certain of the first time they were used. However, they were used in three different subpoenas directed to Mr. Curry, Mr. Middlestadt, Mr. Sanders, and I believe Mr. Judd, that language, and to that extent my statement to the Court was in error.

This morning Mr. Koch has received some additional portions of the airline's manual and I haven't had an opportunity to see it all. Our position would be, however, that if Counsel intends to use them I think that we should be entitled to know whether or not he has all of the DC-4 operating manual and their maintenance manual or whether they are just using the parts that they want since defendant has

taken the position that anything in the company's records that's not within a hundred miles of this court is beyond the jurisdiction of this court. I of course assert that that is incorrect, that the defendant is before the court and that the defendant should be ordered and [252] has a responsibility——

The Court: You have a right now to demand any record that you know the defendant possesses or have good reason to believe it possesses, whether you have ever previously demanded it or not.

Mr. Riley: I understand that, your Honor.

The Court: And so does opposing Counsel have the same right respecting any records or any written data that is in your possession other than the written data made by Counsel acting as Counsel in the case touching his own work effort and as an attorney in the case.

That is all I have to say further about that. There seems to be nothing before the Court right now unless there is being some use made of it presently and you wish to point out what that thing is as to which you seek the Court's ruling at this time.

(There was further discussion with respect to the documents referred to.)

The Court: Very well. You may proceed, and I ask the witness who was on the stand yesterday to resume the stand. I believe that was Mr. Pitcher.

• EDWARD K. PITCHER

(Resumed the stand.)

The Court: I want to ask Mr. Pitcher one ques-

(Testimony of Edward K. Pitcher.)

tion that is not very important to Counsel but [253] that might help me understand his statements a little better.

Mr. Pitcher, in what localities did you spend most of your time between ages ten and twenty-five, between your ages——

A. Ten and twenty-five?

The Court: Yes. Where did you live?

A. In Michigan, sir.

The Court: Principally during that time?

A. In Michigan, up to—from ten to nineteen I was in Michigan, and from nineteen to twenty-two years I was in the Navy. From twenty-two years——

The Court: How many years were you in the Navy?

A. Four years, sir.

The Court: And what else?

A. And after twenty-two years I've been in Seattle and I've been in Seattle since.

The Court: Ever since age about twenty-two?

A. Twenty-two.

The Court: You may inquire. You have a singular inflection and I am not always sure that I understand you. You may proceed. [254]

Cross Examination—(Continued)

Q. (By Mr. Koch): Mr. Pitcher, yesterday as I recall you testified that Plaintiffs' Exhibit 12——

Mr. Koch: I wonder if you would hand that to him.

(Testimony of Edward K. Pitcher.)

(The exhibit was handed to the witness.)

Q. (By Mr. Koch): —applied to aircraft owned by Northwest Airlines only. Is that correct?

A. Yes, sir.

Q. And I understood you to further state that there were modifications of that manual provision with respect to leased aircraft.

A. There would be a supplement to it.

Q. A supplement to what?

A. Well, it would be a supplementary bulletin that would tell us how the airplane was set up inside, the configuration of the airplane.

Q. You mean how it differed from the craft that Northwest Airlines owned?

A. How it differed from Northwest, yes, sir.

Mr. Koch: Mr. Bailiff, I wonder if you would hand to the witness Plaintiffs' Exhibit 13.

The Court: That will be done.

Mr. Koch: Excuse me, I guess it's A-15 [255] that I mean.

The Court: Defendant's A-15 relates to Wean's report which this witness used in respect to his relationship with Mr. Matthews.

(Defendant's Exhibit No. A-15 was handed to the witness.)

Q. (By Mr. Koch): Now, Mr. Pitcher, can you tell us whether the sketch which is a portion of A-15 sets forth the configuration according to the Northwest operating manual, Plaintiffs' 12, or according to the TWA leased bulletin modification?

A. It would be more on the supplementary copy

(Testimony of Edward K. Pitcher.)

because the interior arrangement of this aircraft was different than ours.

Mr. Koch: I have no further questions.

The Court: Anything on redirect?

Redirect Examination

Q. (By Mr. Riley): Mr. Pitcher, you have discussed this matter with Counsel for the defendant airline, haven't you?

A. I don't know what you mean by that.

Q. I mean you have consulted with Mr. Koch and you have seen the supplemental materials?

A. No, sir, I haven't. [256]

Q. Have you never seen the supplemental materials? A. No, sir.

Q. Yesterday you were not clear whether or not this cabin configuration was different than the Northwest Airlines manual.

The Court: Ask him. You have no right to state as a fact your last statement.

Mr. Riley: Thank you, your Honor.

Q. (By Mr. Riley): Mr. Pitcher, yesterday did you know whether or not the cabin configuration, cabin arrangement, of Ship 601, which was Flight 324 of January 19, 1952, did you know that the cabin configuration was different from Northwest Airlines' operating manual? A. Yes, sir.

Q. All right. Did you know that there was a supplemental document to the manual other than the one you had before you yesterday?

(Testimony of Edward K. Pitcher.)

A. I knew there was a bulletin at that time, a supplementary copy, yes.

Q. Did you know what that supplemental bulletin provided?

A. No, I don't recall what the bulletin specifically said. I remember at the time those ships were out, all the different kinds of airplanes, there were bulletins sent out showing us the way they differed, such as the water systems, and so forth.

Mr. Riley: May this document be marked for identification?

The Court: It may be. I would make a particular amendment of what I suggested to both Counsel about the right of each to demand of the other a document. That means that you are supposed to deliver into the hands of the person making the demand for his further consideration and disposition subject to the Court's further rulings if he should ask to make a disposition of it, but it is supposed to be in his possession when compliance is made by the one upon whom demand is made.

Mr. Riley: Yes, your Honor. Is that permissible with you, Mr. Koch? I had that document here, and——

The Court: What I mean is it is in your custody and it is up to you to ask what further will be done with it, and if you now ask that it be marked is an exhibit, that will be done.

The Clerk: Plaintiffs' Exhibit 14.

(A loading data sheet was marked Plaintiffs' Exhibit No. 14 for identification.)

(Testimony of Edward K. Pitcher.)

The Court: And the same right will be available to Mr. Koch respecting any similar situation as to records when he is conducting an examination.

You may proceed.

(Mr. Koch examined Plaintiffs' Exhibit No. 14 for identification.)

The Court: Does anyone suggest a name of this instrument reasonably reflecting the nature of its information?

Mr. Koch: It's called a loading data sheet, your Honor.

The Court: Loading——

Mr. Koch: Loading data sheet.

The Court: Loading data sheet.

Mr. Riley: It is dated January 8, 1952.

The Court: January 8th. You may proceed.

Mr. Riley: I offer Plaintiffs' Exhibit 14 in evidence at this time, your Honor.

Mr. Koch: I object to its introduction, your Honor. It hasn't been identified, and by its very caption, Loading Data Sheet, I hardly think it's within this witness' knowledge, and therefore I didn't offer it myself because I don't think it's properly introduced in evidence through this witness.

The Court: Is there anything in the record as to when it was issued, irrespective of the date, and for what time it was in use, if it ever was? Is there anything in the record relating to that?

Mr. Riley: No, your Honor, except Counsel has stated in open court this morning that this is

(Testimony of Edward K. Pitcher.)

supplemental materials to the Northwest operating manual and that he hadn't been able to deliver it and that he just received it from the defendant last night.

The Court: Do both Counsel agree that this was in effect on the date of this accident?

Mr. Koch: I don't know, your Honor, and furthermore I don't say that's part of the operating data. I have the bulletin here that says that it's part of the operations manual, but—

The Court: Have you seen the bulletin or have you made any demand that covers the bulletin?

Mr. Koch: He's seen it. It's been here for both of us.

Mr. Riley: He just brought it in this morning and I've seen it. The documents that I examined, I would demand and request that they be delivered to me now.

The Court: Do you make a demand for the production of it at this time?

Mr. Riley: I do demand, your Honor.

The Court: Very well. Look at them and see if you wish those marked. [260]

Mr. Riley: I will ask that they be marked. Since they are separate sheets, I presume—

The Court: It would be appropriate for Counsel to consider whether it is needful to separate them. Everyone would favor a minimum number of exhibits.

Mr. Koch: It's all Bulletin 144. It's all the same bulletin, your Honor.

(Testimony of Edward K. Pitcher.)

The Court: Then there is no need of separating it, is there?

Mr. Riley: I don't believe so, your Honor.

The Court: If one sheet is admissible, the whole thing is admissible.

Mr. Riley: Very well, your Honor, and it should be marked for identification. It is captioned DC-4 Bulletin No. 144 dated August 29, 1951.

The Court: State the number of the bulletin.

Mr. Riley: DC-4 Bulletin No. 144 dated August 29, 1951.

The Court: Let it be marked.

The Clerk: Plaintiffs' Exhibit 15.

(DC-4 Bulletin No. 144 dated August 29, 1951, was marked Plaintiffs' Exhibit No. 15 for identification.)

Q. (By Mr. Riley): Now, Mr. Pitcher, examining what has [261] been marked as Plaintiffs' Exhibit 14, can you identify that document and tell me what it might be?

A. Well, it's a loading data sheet that gives the weights of various items that are in the aircraft and the center of gravity, fuel tanks capacity and weight, and so forth.

The Court: Do you mean that that data is as to some imaginary freight item or do you mean it is a record of some particular items which were shipped on board defendant's aircraft?

A. No, sir, it's a table that gives the weights of various——

The Court: Permissible weights acceptable for

(Testimony of Edward K. Pitcher.)

carriage by the aircraft, or what do you mean?

A. For figuring the weight of the aircraft, your Honor.

The Court: It is a rule of thumb for figuring the weight of transportable items to be transported on an aircraft, is that right?

A. Yes, sir. It has the weight of life-saving equipment, it has the tank capacities in pounds. It's for figuring the weight and the——

The Court: It is a freight computation——

A. Or slide rule.

The Court: Slide rule? [262]

A. Yes, sir.

Q. (By Mr. Riley): Is that a part, or can you tell whether that was a part of the DC-4 operations maintenance manual for Northwest Airlines?

Mr. Koch: Your Honor,——

A. No, I wouldn't.

The Court: For what period? You have not stated that, have you, in your question?

Mr. Riley: I beg pardon, your Honor.

The Court: I did not hear a time of effectiveness stated in your question.

Q. (By Mr. Riley): Can you tell from the document before you the effective date of the document? Would you please examine it and ascertain whether it can be shown what the effective date of it is?

A. It's dated as January 8th, 1952.

Q. January 8th, 1952. Does it relate to all aircraft in the Northwest Airlines system or just

(Testimony of Edward K. Pitcher.)

specific aircraft? A. Specific aircraft.

The Court: I remind Counsel on both sides the date alleged is January 19, 1952, as the date of this accident.

Mr. Riley: Thank you, your Honor.

The Court: That is the date this Court is [263] interested in in this case. I am not interested in any other date except in so far as that information may be relatively connected with the information that is needed in this action respecting January 19, 1952.

Mr. Riley: Thank you, your Honor.

Q. (By Mr. Riley): Does Plaintiffs' Exhibit 14 deal with specific aircraft in the system or all aircraft in the Northwest system on the effective date of the document before you?

Mr. Koch: Your Honor, I must object to the further questioning of this witness on these exhibits because by his own testimony and the nature of his duties—we have a room full of experts that can provide all this information, and it's a waste of the Court's time and it's an imposition on the witness to ask him questions that are completely beyond his activities with the company.

The Court: Does that statement cause examining Counsel to at this time ask that any other witness be used or that he have the opportunity of using any other witness, or do you insist that you have a right to ask this witness these questions?

Mr. Riley: Well, Counsel didn't object when we asked this witness with respect to those portions

(Testimony of Edward K. Pitcher.)

of the manual he had seen fit to deliver to us earlier, [264] and——

The Court: The objection is overruled. Proceed.

Mr. Koch: Your Honor, I did object. I've been objecting to the fact that this witness is testifying on matters not within his knowledge from the beginning.

The Court: The objection is overruled. The Court does not understand the witness is giving any informative answers without having knowledge of his answer. You may proceed.

Mr. Riley: Would you read the last question?

(The reporter read the last question as follows: "Does Plaintiffs' Exhibit 14 deal with specific aircraft in the system or all aircraft in the Northwest system on the effective date of the document before you?")

A. Well, I have no occasion to use a sheet of this type. I couldn't answer that, as to whether it is or not. It seems to have on here several ship numbers.

Q. (By Mr. Riley): What ship numbers does it refer to?

A. Ships 404, 403, 601, 602, 608, 650, 653, and 673.

Q. Do you know whether or not 601 was the same aircraft [265] which crashed at Sandspit on January 19, 1952?

A. I presume it would be 601. It's listed here, Ship 601.

(Testimony of Edward K. Pitcher.)

Q. Does it——

The Court: What is there about “here” that identifies what you refer to as “here” with the aircraft which crashed upon the occasion alleged in this case?

A. To my knowledge we only had one ship 601.

The Court: What ship had a 601, if you know, with reference to the one that crashed or is alleged to have crashed at Sandspit?

A. That was Ship No. 601.

Q. (By Mr. Riley): Does Plaintiffs’ Exhibit 14 which you have before you illustrate the cabin configuration of Ship 601 on the effective date of that instrument, January 8, 1952?

A. This is a loading sheet. It shows only the way the ship is marked off in sections for loading.

Q. Does it show the locations of the seats?

A. It shows some seats in it, yes.

Q. I direct your attention to the center bottom portion of the sheet and I ask you to read to the Court what the sheet states about the location of emergency equipment in Ship 601. [266]

A. It says, “The last two seats on the right side used to store emergency gear.”

Q. Now, where are the last two seats on the right side? A. In Section J.

Q. According to the schedule——

Mr. Koch: Your Honor, I object to his testifying from the contents of an exhibit which is not in evidence.

The Court: The objection is sustained.

(Testimony of Edward K. Pitcher.)

Mr. Riley: I now offer the exhibit in evidence, if your Honor please.

The Court: Which exhibit?

Mr. Riley: Plaintiffs' Exhibit 14, in evidence, having been identified as in effect on January 8, 1952.

Mr. Koch: I object to its introduction, your Honor. I don't believe that it has been properly identified by this witness. We don't know when it became effective. There is no testimony that it's part of Supplemental Bulletin 144 or that it is the instrument that is said to modify for TWA planes the information otherwise contained in Northwest operating manual provisions of Plaintiffs' Exhibit No. 12.

The Court: Do you care to recount what this witness has said regarding the effectiveness of this [267] exhibit on the day of the accident? Will you recount the evidence that you rely upon now in the record establishing or tending to establish that fact? By "recount it," I mean tell it again.

Mr. Riley: It's my understanding that he has identified it as a portion of the manual, a supplementary document relating to the ships which are presumably——

The Court: He said it related, as I understood, to 601, and then said that the only——

Mr. Riley: Yes, and then said that 601 was the ship which crashed, which is the subject matter of this action.

The Court: But I do not recall him saying in

(Testimony of Edward K. Pitcher.)

that case when it was in effect with reference to the 19th of January, 1952. If you recall some evidence on that will you please relate that evidence now, refer to it, point it out?

Mr. Riley: I think we're entitled to—because January 8th and January 19th are less than two weeks apart, that the document was applicable.

The Court: Have you tried to find out from this witness if he knows whether or not it was in effect?

Mr. Riley: If the Court please, I will [268] inquire further.

Q. (By Mr. Riley): Can you tell, is there anything on the document marking the document as having been superceded or cancelled?

A. I don't know anything about this document. I wouldn't have——

The Court: Answer that question.

A. The only thing I see on here is the date up at the top, the date of January 8th.

The Court: Is that a cancellation date or the promulgation of effectiveness date, if you know?

A. I wouldn't know.

The Court: You may inquire.

Q. (By Mr. Riley): Would you read the language at the top of the page relating to January 8, 1952?

The Court: Read it silently, do not read it out loud.

(Brief pause.)

Q. (By Mr. Riley): What does it say?

The Court: No,——

(Testimony of Edward K. Pitcher.)

Mr. Riley: Pardon me, Your Honor.

Q. (By Mr. Riley): Having read the same can you tell whether or not it was effective on January 8, 1952, or is deemed cancelled on January 8, 1952?

The Court: You should answer yes or no to [269] that question.

A. Well, I don't know, Your Honor, because I have never seen this sheet. I have nothing to do with the sheet.

The Court: That is not the question before you. Just answer yes or no after considering this question. Will you read the question, Mr. Reporter.

(The reporter read the last question as follows: "Having read the same can you tell whether or not it was effective on January 8, 1952, or is deemed cancelled on January 8, 1952?")

A. I'd say it was effective on January 8th.

Mr. Riley: I think that should be sufficient, Your Honor. I ask the Court to examine the document. I believe that there's nothing showing on the face of it showing that it was cancelled, there's nothing showing when it was cancelled, and it can be presumed to be effective on January 19th. The defendant will have every opportunity to show that it wasn't if that's the case, which I'm sure it's not.

The Court: Mr. Koch, do you wish to comment on the correctness of that rule of law as a presumption of continuation in effect of something

(Testimony of Edward K. Pitcher.)

established to [270] have been at one time in effect?

Mr. Koch: Well, as far as I can tell from the interrogation, the date appears on the top of the page. That's all that appears. This is not a manual provision, Your Honor. It's called a loading data sheet, and a loading data sheet may be relevant for some things but I don't see how it could be said to be a supplemental bulletin when we've had what has been separately identified as a supplemental bulletin marked and not introduced. Now,——

The Court: Mr. Riley, have you established by the testimony of this witness that he acted in any way under the authority and provisions of that exhibit?

Mr. Riley: He stated yesterday, Your Honor, or whenever he was first on the stand, that he was familiar with these manuals; he stated that it was his function to see that the ditching pamphlets and folders which were installed on the aircraft were the pamphlets which were correct for the particular configuration of aircraft.

We have here a document which shows the configuration of Ship 601. I state——

The Court: I thought he said it was a loading data sheet.

Mr. Riley: He testified also that it shows [271] the cabin configuration of Ship 601.

Mr. Koch: For loading purposes. It's a loading data sheet. It isn't part of the manual and he

(Testimony of Edward K. Pitcher.)

hasn't testified that he acted under it or that he knows anything about it.

Mr. Riley: Oh, let's not play on words, Counsel. I mean he——

The Court: I am not satisfied of the record on that point. The Court reserves ruling until you have satisfied the Court that there is proof by some witness, which the Court understands to be direct proof, that to his personal knowledge by reason of his using it or acting upon it in some way that this was in effect at that time, on the date of its issuance date.

Mr. Riley: If Your Honor please, this is exactly what we've been confronted with the whole time. Counsel brings in a bunch of documents which he says that he received from the defendant airline which were documents in response to a subpoena. I asked for documents, and if the Court please I'll refer to that again, "All applicable components"——

The Court: Mr. Riley, the Court's ruling will stand and you may proceed with something else. I do not wish to hear further argument.

Mr. Riley: Well, he has identified these [272] as documents which have been given to him by the defendant airline which were in effect on January 19, 1952.

The Court: I did not so understand his statement, but I will ask you to produce evidence to that effect. You may proceed. That is, if you wish the Court to finally rule upon it at this time.

(Testimony of Edward K. Pitcher.)

Mr. Riley: Well, I'll withdraw my request that this be admitted as an exhibit at the present time.

Q. (By Mr. Riley): Mr. Pitcher, I'll ask you to state where the life rafts according to that drawing are shown to be located?

Mr. Koch: I object to the form of the question. There is no testimony——

The Court: That objection is sustained. That is not in evidence, and your question in effect asks him for the contents of an unadmitted document.

Mr. Riley: Your Honor, I will reoffer Plaintiffs' Exhibit 14 in evidence.

The Court: The objection to it is sustained for the present with leave to later further identify it.

Mr. Riley: Will the bailiff deliver Plaintiffs' Exhibit 15 to the witness?

The Court: That will be done. [273]

(The exhibit was handed to the witness.)

The Court: You see, we surely are spending a great percentage of trial time in fooling around with these documents.

Mr. Riley: Well, I agree.

The Court: Counsel should have investigated a lot of law and brought this thing into clear focus long before this time. It is what happens in two-thirds of the trials we have in this court. You should have taken depositions and established these things.

Mr. Riley: Oh, I shouldn't take the Court's time to observe that we absolutely and have been

(Testimony of Edward K. Pitcher.)

entirely without funds. We can't go flying back to St. Paul, Minnesota, taking expensive depositions. We think that we have a right when we demand documents of an airline which is doing business in this state and subpoena them lawfully, we think we have a right that they produce them identified as the documents which were in effect on January 19, 1952. This the defendant has not done, and I think it's unfair and it's prejudicial.

The Court: You should read the subpoena that asked that they so act and then you should produce evidence of the action. You have not called to the [274] Court's attention the subpoena. I have not before me the terms of any subpoena. You have not called to the Court's attention the specific action pursuant to that subpoena.

Mr. Riley: This matter was one of the first things that was before the Court at the commencement of this trial when the defendant——

The Court: Where is the subpoena?

Mr. Riley: ——moved to—they are in the record.

The Court: Get the record.

Mr. Riley: Will the clerk give me the file in the Gorter case?

(The file was handed to Mr. Riley.)

The Court: Now have you a copy of the subpoena?

Mr. Riley: I do, Your Honor.

The Court: Get your copy and mark the places that you wish to call to the Court's attention, on

(Testimony of Edward K. Pitcher.)

your copy, so that when the Court gets this one I can verify what you say. You can make any sort of a reminder mark on your copy.

Mr. Riley: Well, I'll refer to——

The Court: Now, you see, that illustrates another thing. Sometimes Counsel in a case assume [275] that the Court ought to know what they know without proof and that they ought to be able to state by way of argument facts which they know quite well and are quite justified in knowing upon the information they have, but that is not sufficient. Counsel owes it to the Court and it is necessary that Counsel adduce proof before the Court to substantiate the facts known by Counsel from his long months of study and acquaintance-ship with the details of the case.

(The file was handed to the Court.)

Mr. Riley: I refer to Paragraph 6 of the subpoena before Your Honor.

The Court: I have before me the subpoena duces tecum which was—I do not know whether it was filed here or not. I do not see any filing mark on it. Was it attached to something else, Mr. Clerk? I do not see any filing mark on it. Take it down to Counsel.

(The file was handed to Mr. Riley.)

The Court: That copy you have there may have been attached to something else which was filed. It may be attached to the Marshal's return.

The Clerk: They are all 98, Your Honor. It was filed on——

(Testimony of Edward K. Pitcher.)

The Court: What is it? You make the statement [276] so Counsel can know as much about the Court's knowledge as the Court does.

Mr. Riley: It's attached to Document No. 98, which is the return of service by——

The Court: By the Marshal, is that right?

Mr. Riley: No, sir, Your Honor, it's a return of service by Robert W. Windsor.

The Court: Was he appointed by the Court to serve?

Mr. Riley: Not to my knowledge, if Your Honor please.

The Court: Is he under the rules permitted to serve?

Mr. Riley: Yes, he is, Your Honor.

The Court: All right.

Mr. Riley: I can read the affidavit of service if you wish.

The Court: No, that is not necessary, but there is a good example of having service made by somebody other than the Marshal. The Marshal's acts are official. If the Marshal made a return—but he does have an affidavit of service, does he?

Mr. Riley: Yes, he does, Your Honor.

The Court: Very well. Let me see it. The purpose of this is so the Court can know what date it [277] was.

Mr. Riley: The document was filed on the 21st day of March.

The Court: Let me see it. Do you have a copy of the subpoena?

(Testimony of Edward K. Pitcher.)

Mr. Koch: I don't know which subpoena it is, Your Honor. There are a number of them.

(The file was handed to the Court.)

The Court: The subpoena has a first paragraph in it and fourth line commanding Northwest Airlines to appear in this court at 704 United States Court House on the 22nd day of March, 1957. It was dated the 18th day of March, 1957. A duces tecum signed by the Clerk of this court at the request of Mr. Riley. That is the date of it, apparently. Another one was dated the same date, addressed to Northwest Airlines. There are two subpoenas duces tecum attached.

Mr. Riley: Both of those documents, and particularly the one to Northwest Airlines and Mr. Curry, in Paragraph 6 I direct the Court's attention to the line——

The Court: The paragraph bearing Arabic No. 6 on the second sheet thereof at Line 13?

Mr. Riley: Yes, Your Honor. [278]

The Court: What does that say?

Mr. Riley: "All applicable components of Northwest Airlines manual and Northwest Airlines DC-4 operating manual and Northwest Airlines maintenance manual as maintained by defendant airline on or about January 19, 1952."

The Court: Very well. Now what else do you have to say about anything coming to your——

Mr. Riley: I understood and I intended and I did demand at the time the documents were submitted to me the remaining portions of those

(Testimony of Edward K. Pitcher.)

manuals in the possession of Counsel. I understood that that's what he had, that's what he had asked the company for and that's what he brought into court this morning and that what he was delivering to me when they were identified by the clerk for submission to this witness.

The Court: What is your response as to whether that was what you were acting on in respect to?

Mr. Koch: Your Honor, the Court—I wonder if the Court would indulge me just a moment for the background of this.

The Court: No, I do not want to hear that.

Mr. Koch: On this particular point, we gave Counsel whatever we had. We came into court and laid [279] it all on the table——

The Court: Did you do it in response to Paragraph 6?

Mr. Koch: Well, we've said that we didn't feel it was our duty to determine what the applicable components were and the Court ruled that that wasn't our responsibility, that we weren't—that it put an unreasonable burden on defendant to decide what plaintiff considered the applicable components.

All there was that we had we made available to Mr. Riley, but that there might be other applicable components that we had we couldn't take the responsibility for. We couldn't select the ones that were unfavorable and return them so we wouldn't have them, every one that we thought was relevant we have had brought here. But the others

(Testimony of Edward K. Pitcher.)

we are in the process of obtaining, and as soon as we get them we make them available to Counsel.

The Court: I will hear from opposing Counsel.

Mr. Riley: Now, did I understand you, Mr. Koch, to state that these are parts of the manual in effect on January 19, 1952, or not, in response to the subpoena?

Mr. Koch: No, we——

Mr. Riley: Then why did you bring them into [280] court if they're not?

Mr. Koch: The bulletin is a part of the supplementary operating manual and I already had told the Court in response to the question at the opening of the session that we weren't splitting hairs, that if it became a part of the manual applicable by way of supplement, then we considered that part of the manual and we provided the supplemental bulletin, but this loading data is not part of the manual so far as I know. It appears to be something in the nature of an inspection or loading form. I think that otherwise, if it is a part of the manual, will clarify that, but as far as I know it is not; and I may be incorrect, I just don't know this much about it.

I do know that every manual provision has a code reference, and it says—it has a paragraph like R. C. W. Paragraph 22.04.06. This has no such information, and therefore I conclude that it is not part of the Northwest operating manual and is unrelated to Bulletin 144.

The Court: What is the comment of Counsel,

(Testimony of Edward K. Pitcher.)

at Plaintiffs' Exhibit 15 tell what it is, Mr. Pitcher? And please answer that yes or no.

A. 15?

Q. Yes. A. It's a service bulletin.

Q. What is a service bulletin?

Mr. Koch: If you know.

A. Oh, it would be describing some changes, or—do you want to see this, Your Honor?

The Court: "Service", what do you mean by "service"? A bulletin for what, a bulletin that touches what kind of work or thing?

A. Something unusual or something not covered in the manuals, or something like that, I believe. I—

The Court: Try to understand that you are to give the same kind of answer to that that you would give to a child that never heard anything about this case or any work that any witness employed by the defendant airline ever did as to any subject. Consider [284] that everybody else is wholly ignorant. Now then, with that in mind will you read this question.

(The reporter read Mr. Riley's last question as follows: "What is a service bulletin?")

A. Well, I don't know whether it would be a true definition or not, but it would be a bulletin that would be covering some new type aircraft or some changes that would be put out before a manual change, or—

Q. (By Mr. Riley): Do these bulletins become a part of the manual or the maintenance manual?

(Testimony of Edward K. Pitcher.)

A. That I don't know.

Q. Are they regarded as part of the manual?

Mr. Koch: I object. He just said he didn't know.

The Court: Overruled.

A. That I don't know. That's not—I have nothing to do with that.

Q. (By Mr. Riley): You stated you're familiar with the maintenance manuals. When you consult a maintenance manual on a question do you also consult the service bulletins?

Mr. Koch: I'll object to that, Your Honor.

The Court: Overruled.

Mr. Koch: It hasn't been established that [285] he does consult the maintenance manuals.

The Court: Overruled.

A. If there's a service bulletin on it we look at it, yes.

Q. (By Mr. Riley): All right. What is the effective date of that service bulletin before you, if you can tell from looking at it?

The Court: Or from his own knowledge.

Q. (By Mr. Riley): Or from your own knowledge.

Mr. Riley: Thank you, Your Honor.

A. The only thing I could read here would be——

The Court: Do not read it out loud. Consider your own knowledge, independent of that. Consider that, and then thereafter give your answer to the question.

(Testimony of Edward K. Pitcher.)

A. What was the question again, please?

The Court: Read it.

(The reporter read the question as follows:

“What is the effective date of that service bulletin before you, if you can tell from looking at it, or from your own knowledge?”)

A. I don't know.

Q. (By Mr. Riley): Does the document have on the top of it or does it not notations indicating the effective [286] date and the date of the document which it supercedes?

A. It has a date and it has——

The Court: Do not state what the date was.

A. It has a date that it supercedes.

Q. (By Mr. Riley): Now you can read it, and can you, having read it, tell us what the effective date of it was?

A. It's dated August 29, 1951, and it supercedes the January 5, 1951.

Q. Does the document before you deal with specific ships in the Northwest Airlines fleet on January 19, 1952, or with all ships in the Northwest Airlines fleet on that date?

Mr. Koch: I object to the question.

The Court: If you know.

Q. (By Mr. Riley): If you know.

Mr. Koch: He hasn't testified that it was in effect at all in January of 1952.

The Court: The objection is overruled. Read the question, with the Court's imposed condition.

(The reporter read the question as follows:

(Testimony of Edward K. Pitcher.)

“Does the document before you deal with specific ships in the Northwest Airlines fleet on January 19, 1952, or [287] with all ships in the Northwest Airlines fleet on that date, if you know?”)

A. This deals with ships that we were operating from other airlines.

Q. (By Mr. Riley): Can you tell or do you know from your own knowledge whether or not that document deals with Ship 601, which was the ship which crashed on January 19, 1952, at Sandspit?

A. Well, that ship is listed here.

The Court: Is your answer yes or no, Mr. Pitcher? A. Yes.

Q. (By Mr. Riley): And does it or does it not?

The Court: He has answered yes.

A. Yes.

Mr. Riley: Thank you, your Honor. I now offer Plaintiffs' Exhibit 15 and ask the Court to examine same. I believe that its contents and——

The Court: I want you to see if there is any other witness here that can give any information on this.

Mr. Riley: I believe there is. Mr. Matthews.

The Court: The Court will take a recess at this time. Do you wish to excuse this witness from the [288] stand or do you wish to cross examine any more?

Mr. Koch: I just have one question I would like to ask.

(Testimony of Edward K. Pitcher.)

The Court: Ask that and then we will have the recess.

Mr. Koch: Mr. Bailiff, may I see Plaintiffs' Exhibit 14.

(The exhibit was handed to Mr. Koch.)

Recross Examination

Q. (By Mr. Koch): In the center panel, Mr. Pitcher, where you see the two cabin configurations outlined on Exhibit P-14, do you see those two outlines? A. Yes.

Q. The upper configuration applies to what ships? A. 403.

Q. Will you read the language just above and down at the bottom of the page surrounding those two configurations?

A. I don't get just where you mean, sir.

Q. Read the bottom line.

A. The bottom line?

Q. Yes, just below the——

The Court: Read it silently.

(Brief pause.) [289]

Q. (By Mr. Koch): Now, what ship does the bottom configuration apply to? A. Ship 673.

The Court: Court will be at recess ten minutes.

(Short recess.)

The Court: The Witness will please resume the stand for further interrogation and you may resume it, Mr. Koch.

Q. (By Mr. Koch): Mr. Pitcher, referring again to Plaintiffs' Exhibit 14 and to the two airplane

(Testimony of Edward K. Pitcher.)

configurations which appear on that exhibit, will you tell me to what airplane the bottom configuration, the one at the bottom of the page, refers to?

A. 673.

Q. That's Airplane No. 673?

The Court: 60, or——

A. 673.

Q. (By Mr. Koch): And what is the passenger capacity of Ship 673?

Mr. Riley: I haven't any idea what the relevancy of Ship 673 has in this action.

The Court: And how is it within the scope of the other examination? What is this, recross examination? It is, is it not? [290]

Mr. Koch: Yes, your Honor. The reason is that the witness was asked to testify with respect to this very configuration by Mr. Riley, and I want to clarify the error that was made, is all.

The Court: The configuration as to this plane, he was centering more upon 601, wasn't he?

Mr. Koch: Exactly, but Mr. Riley referred him to the wrong configuration and had him testify——

The Court: Did he refer him to this configuration relating to this airplane?

Mr. Koch: Yes. He asked him to read the bottom line, which does not refer to 601, it refers to 673.

The Court: You may inquire.

Q. (By Mr. Koch): What is the passenger seating capacity of Ship 673?

The Court: Except in making that statement

(Testimony of Edward K. Pitcher.)

Mr. Koch: I have no further questions.

The Court: Is it essential to ask anything else or should you not go on to another witness now?

Mr. Riley: I have two questions, your Honor, which I think are very critical.

The Court: Do you mean accurately two questions?

Mr. Riley: Well, two topics which are critical to the Plaintiffs' case.

The Court: You know the other side has the last word in this thing if there is anything that is important, Mr. Riley. Having that in mind, you may—is it something that has been developed [294] in this recross examination?

Mr. Riley: Yes, your Honor. He stated that these two documents show the configuration of Ship 601. I'm not clear whether I developed from him that Exhibit 14 shows the location of the life rafts and, if so, where. I want to show that they show that they are aft of the main cabin door instead of forward, and that he knew that was the case when they loaded these pamphlets.

The Court: You may inquire.

Redirect Examination

Q. (By Mr. Riley): Mr. Pitcher, you prepared the sketch attached to Exhibit A-15, did you not?

A. Yes.

Q. And you state that it is the same and it is in conformity with the diagrams contained in Plaintiffs' Exhibit 14?

(Testimony of Edward K. Pitcher.)

A. Which one is 14, this one?

Q. The loading data sheet.

A. It would be the same as this upper diagram.

Q. Is it correct that you prepared the sketch in Exhibit A-15 shortly after the crash of Flight 324 in January of 1952? [295] A. Yes, sir.

Q. And did you know that that was the configuration at the time the aircraft was loaded with ditching pamphlets when Flight 324 departed for the Orient?

A. The same as this, yes, sir.

Q. And did you know that the ditching pamphlets you were placing aboard illustrated a different cabin configuration than actually existed in Ship 601, which was Flight 324 on January 19, 1952?

A. I don't remember which ditching folders we were using at the time on that ship.

Q. But you have testified——

The Court: "Have you not."

Q. (By Mr. Riley): ——have you not, that all of the DC-4's in the Northwest Airlines operating fleet which were Northwest Airlines ships in each case had the stowage of the life rafts forward of the main door, isn't that correct?

A. Not all of them were forward.

Q. Well, what exceptions? Do you mean by the exceptions that those——

The Court: Wait just a moment. Withdraw the first question, if you wish to proceed.

(Testimony of Edward K. Pitcher.)

Mr. Riley: I will withdraw the first question, if the Court please. [296]

Q. (By Mr. Riley): Now, Mr. Pitcher, which ships did not have life rafts stowed forward of the main door?

A. I don't know. There was too many ships. I don't remember all of them.

Mr. Riley: Well, I have no further questions, if your Honor please.

The Court: Anything further?

Mr. Koch: No questions, your Honor.

The Court: Mr. Pitcher is excused from the stand.

(Witness excused.)

Mr. Riley: I'll call Mr. Opsahl.

May it please the Court, we anticipate calling this afternoon, and we ask to commence Mr. Opsahl's testimony in anticipation of interrupting his testimony in order that Mrs. J. R. Bloth, who is a resident of Alamogordo, New Mexico, who flew here last night to testify, she is the guardian of the daughter of the decedent J. M. Waldrep, and she——

The Court: Do you ask leave to reserve that right?

Mr. Riley: Yes, I do, your Honor.

The Court: Is there any objection?

Mr. Koch: No objection. [297]

The Court: That will be granted.

No. 15670

United States
Court of Appeals
for the Ninth Circuit

NORTHWEST ORIENT AIRLINES, INC.,
Appellant,

vs.

GERALDINE B. GORTER, as Administratrix of
the Estate of John M. Waldrep, Deceased,
Appellee.

Transcript of Record

In Three Volumes

VOLUME II.

(Pages 379 to 768, inclusive)

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

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No. 15670

United States
Court of Appeals
for the Ninth Circuit

NORTHWEST ORIENT AIRLINES, INC.,
Appellant,
vs.

GERALDINE B. GORTER, as Administratrix of
the Estate of John M. Waldrep, Deceased,
Appellee.

Transcript of Record

In Three Volumes

VOLUME II.

(Pages 379 to 768, inclusive)

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

ALVIN B. OPSAHL

called as a witness by Plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riley): Would you state your full name, Mr. Opsahl?

A. Alvin B. Opsahl. The last name is spelled O-p-s-a-h-l.

Q. And where do you reside, sir?

A. At 2633 Southwest 167th Place.

Q. I think you had better spell your last name for the record, or did you? A. I did.

Q. Oh, pardon me.

The Court: O-p-s-a-h-l?

A. Yes, sir.

The Court: It is Elton, E-l-t-o-n?

A. Alvin, A-l-v-i-n.

Q. (By Mr. Riley): And where are you employed, Mr. Opsahl?

A. Northwest Orient Airlines at Seattle, Washington.

Q. And in what capacity, sir?

A. Senior Supervising Inspector. [298]

A. And how long have you been in that capacity? A. Since 1950.

Q. Were you Senior Supervising Inspector in Seattle on January 19, 1952? A. Yes.

Q. Would you describe in detail your duties as Senior Supervising Inspector at the Seattle base of the defendant airline, and describe your duties as of January 19, 1952?

(Testimony of Alvin B. Opsahl.)

A. My duties are as a Senior Supervising Inspector to see that the company rules and the CAA rules are enforced, see that the inspectors are properly trained, see that the inspection is coordinated with the other divisions of the airline.

The Court: And when did you say you began as that Senior Supervising Inspector?

A. Since 1950.

The Court: What month, do you remember?

A. Oh, approximately July.

The Court: You may inquire.

Q. (By Mr. Riley): Are there prescribed, and were there on January 19, 1952, prescribed regulations relating to the installation of life rafts and life vests, flares, emergency lighting equipment, and other survival equipment aboard aircraft [299] engaged in overseas traffic? A. Yes, sir.

Q. Are you familiar with Ship 601 which crashed as Flight 324 on January 19, 1952?

A. With the service bulletins to refresh my memory, yes.

Q. Did you cause or had you caused an inspection of Flight 324 or Ship 601 before it departed for the Orient?

A. Yes. Every flight going to the Orient is inspected.

Q. Are records kept of these inspections?

A. Yes.

Q. Do you have such records?

A. I do not. They are sent in to St. Paul every day.

(Testimony of Alvin B. Opsahl.)

Q. Did you review the records after the crash of Flight 324?

A. The records were back at St. Paul at that time.

Q. You did not review them? A. No.

Q. Then you do not know whether or not a proper inspection of Ship 601 was accomplished prior to the time it left for the Orient before its ill-fated crash?

Mr. Koch: I object to the form of the question, your Honor.

The Witness: I can answer that question——

The Court: Just a moment. [300]

Do you understand the question?

A. Yes.

The Court: The objection is overruled. You may answer.

A. Yes. That inspection was proper.

Q. (By Mr. Riley): How many people do you have in your department, Mr. Opsahl?

A. At the present time, just ten.

Q. At that time.

A. At that time, around seventeen.

Mr. Opsahl, you have discussed with Mr. Koch, or Counsel for the defendant airline, in some detail what might be expected here, have you not?

A. Very little.

Q. And you are a department head for the defendant airline? A. Yes.

Mr. Riley: If your Honor please, I want to state again for the record that I called Mr. Opsahl

(Testimony of Alvin B. Opsahl.)

as an adverse witness, and I asked the Court for permission in compliance with Rule 43(b) to examine him with leading questions if necessary under that Rule which we have discussed heretofore.

I think the fact that he is a department head places him within that Rule, and it would [301] serve to facilitate the examination, and I believe that we are entitled to that under those circumstances.

Mr. Koch: Your Honor, I submit there is no basis whatever for the request. I haven't talked to Mr. Opsahl for a total of five minutes.

The Court: The Court will not go into the facts about that. The Court denies the request that he be called as an adverse witness because I believe he does not come within the meaning of a managing agent or the kind of agent of a corporation which is mentioned in that Rule, Rule 43(b).

Mr. Riley: I won't pursue that any more, your Honor. I wanted to make the record on it, however, and I will do my best to proceed without wasting the Court's time further.

Q. (By Mr. Riley): Mr. Opsahl, were you in January of 1952 then responsible for the installation of life rafts in aircraft?

A. We were not responsible for the installation. The mechanical people are responsible for the installation and we are responsible for the inspection to see that it's in there, and see that it has not expired.

Q. Are you responsible to see that the rafts are

(Testimony of Alvin B. Opsahl.)

installed in the locations as prescribed by your Operations Manual? [302]

A. That's correct.

Q. And do you know whether or not the rafts in Ship 601 were installed in their positions in accordance with the Northwest Airlines Operating Manual or Maintenance Manual?

A. That question there——

Mr. Koch: Just a moment. I object to the question. He just testified that he didn't have anything to do with the installation, but only as to inspection, and now the question refers to installation.

The Court: The objection is overruled. If he knows the answer, he may give it.

A. You didn't mention airlift. There's a difference between airlift and the regular airline airplanes.

Q. (By Mr. Riley): Would you explain what that difference is?

A. That's explained very clearly in the Service Bulletins. The Service Bulletins actually explain——

The Court: Is there one in evidence you wish to call to his attention in that connection as an exhibit?

Mr. Riley: I have none known to me.

The Court: You may proceed. [303]

A. The Service Bulletin explains the difference of instrumentation, the radio gear, the radio location, the engines, wheels and brakes, and also the inside of the cabin.

(Testimony of Alvin B. Opsahl.)

Mr. Riley: Would the bailiff show Plaintiffs' Exhibit 15 to the witness?

The Court: That will be done.

(The exhibit was handed to the witness.)

The Court: It is called a DC-4 Bulletin.

Mr. Riley: Yes, your Honor.

The Court: You may inquire.

Q. (By Mr. Riley): Inspecting Plaintiffs' Exhibit 15, or having looked at Plaintiffs' Exhibit 15, is this such a document as you were just describing, or is this a Service Bulletin?

A. This is Service Bulletin Number 144, dated August 29, 1951.

Q. Does that Bulletin deal specifically with airlift aircraft, and particularly does it deal with Ship 601 or any other aircraft in use by your Airline on January 19, 1952?

A. It deals with airlift airplanes only.

The Court: Now answer the rest of the questions. Read the question, Mr. Reporter.

(The reporter read the last question.) [304]

A. Well, there's two questions there. You——

The Court: The last one.

A. It deals with the airlift Airplane 601.

The Court: There's another question unanswered. Read the last clause, "and any other."

(The reporter read back as follows: "Q.

* * * * and particularly does it deal with Ship 601 or any other aircraft in use by your Airline on January 19, 1952?")

A. By "any other aircraft" would be any other

(Testimony of Alvin B. Opsahl.)

airlift aircraft that are listed here in this Bulletin.

Q. (By Mr. Riley): Which other ships does it refer to?

A. It refers to 601, 602, 608, 650, 653 and 673.

The Court: Counsel fixed the date of his last inquiry as the 29th of January. I understand another date was alleged as the date of some other event or some event mentioned in the complaint.

Q. (By Mr. Riley): Does that deal with ships which were in use and was it effective on January 19, 1952, or can you tell from your inspection?

A. This was effective August 29, 1951.

Q. Can you tell by——

The Court: Read the last question.

(The reporter read the question as [305] follows: "Q. Does that deal with ships which were in use and was it effective on January 19, 1952, or can you tell from your inspection?")

The Court: There are two questions in one.

Will you strike the last "or can you tell from your inspection." Just strike that.

Now do you wish to put what remains of the question to him?

Mr. Riley: Yes, your Honor.

The Court: Do you understand the rest of the question?

A. Not too clearly.

Mr. Riley: I will strike the last question and rephrase it, your Honor. Thank you.

Q. (By Mr. Riley): Does the document, Serv-

(Testimony of Alvin B. Opsahl.)

ice Bulletin 144, which you have before you, deal with ships in use on January 19, 1952?

A. I don't know for sure, because there could be other Bulletins out after this Bulletin.

Q. Can you tell from the dates and the various descriptions on it whether or not such a bulletin was issued prior to January 19, 1952?

A. This could be superseded several times since that date.

Q. Do you believe that that Bulletin was in effect on January 19, 1952? [306]

A. I believe it was fairly close.

Mr. Koch: I object to the question, your Honor. I——

The Court: The objection is overruled.

Mr. Riley: I offer Plaintiffs' Exhibit 15 in evidence at this time so that I might refer to same on the basis of the witness' testimony.

The Court: 15 is now admitted.

(Plaintiffs' Exhibit Number 15 for identification was admitted in evidence.)

Mr. Koch: I have no objection to it.

The Court: You may proceed to inquire.

Q. (By Mr. Riley): Were your duties relating to the inspection of the life rafts installed in airlift aircraft as distinguished from your regular fleet aircraft different?

A. Was that life rafts?

Q. Yes.

A. The life rafts in the airlift airplanes were

(Testimony of Alvin B. Opsahl.)

practically the same as our regular domestic airplanes.

Q. Were you responsible for the inspection of life rafts installed in Ship 601? A. Yes.

Q. Were you required to see that they were [307] installed in the proper locations?

A. That's our duty, yes.

Q. Do you know whether or not this was accomplished?

A. Yes. If it wasn't accomplished according to the charts in the airplane, the airplane wouldn't have left the ground.

Q. Is it your responsibility to see that the ditching folders which are installed in the aircraft illustrate the proper location of the life rafts?

A. It's the inspector's duty to see that those folders are aboard the aircraft and see that they are the right type, yes.

Q. Whose duty is it to see that the folders pertain to the particular configuration of aircraft?

A. It's the inspector's duty.

Q. Do you know whether or not the folders placed aboard the aircraft were relating to the particular configuration of aircraft in question in Ship 601, which crashed on January 19, 1952?

A. They were the correct folders.

Q. Did you examine them personally?

A. No.

Q. Who did?

A. That's a hard question to answer because

(Testimony of Alvin B. Opsahl.)

there was quite a number of inspectors. One of our inspectors did that. [308]

Q. Is it your responsibility to see that life jackets are placed aboard the aircraft?

A. That's Inspection's responsibility, yes.

Q. And was this accomplished? A. Yes.

Q. Was it your responsibility to see that flares and Very pistols are placed aboard the aircraft?

A. By "flares"—what do you mean by "flares"? Do you mean parachute flares?

Q. Are parachute flares required as part of the emergency equipment?

A. That's required on all aircraft, all aircraft flying at night time.

Q. Were aircraft——

The Court: Will you pause a moment.

How do you spell the word before you mentioned the word "flares," that type of flare?

A. "Parachute"?

The Court: "Parachute," yes. I wish you would speak a little more slowly and articulate your syllables a little bit more.

A. All right. Thank you. A parachute flare is never taken off the airplane. The only time it ever comes off the airplane is during an operational overhaul. [309]

That is always on the airplane.

The Very pistol on the airlift airplane, it stayed on those airplanes all the time.

The Court: What do you mean by "airlift airplanes"?

(Testimony of Alvin B. Opsahl.)

A. An airlift airplane is the airplane that Northwest Airlines leased from the other operators for this specific airlift during the Korean War.

The Court: "Leased," did you say?

A. Yes, leased.

The Court: Do you use the words "airlift airplanes" as distinguished from those airplanes owned as well as operated by the defendant corporation?

A. Yes, sir.

The Court: You may proceed.

Q. (By Mr. Riley): Were these airlift aircraft maintained in any different manner? Were any different standards—strike the question.

Were any different standards of maintenance and inspection applied to airlift aircraft than regularly assigned aircraft of the airline in January of 1952?

A. No different standards. They were equal standards.

Q. All right. Do you know whether or not the [310] proper number of life jackets were placed aboard Ship 601 before it departed for the Orient?

A. Yes.

Q. Do you know what type of jackets were installed aboard the aircraft?

A. Goodyear Life Jackets.

Q. How many types of life jackets were in use by Northwest Airlines during January of 1952?

A. There were two different types, the Goodyear and the Air Cruiser.

(Testimony of Alvin B. Opsahl.)

The Court: Were they on this ship on the date of this accident, if you know?

A. There was just one type on, yes.

The Court: That is what you are inquiring about, is it not?

Mr. Riley: Yes.

The Witness: There was never any mix-up in life jackets. We're very particular on life jackets.

The Court: Could you say just what type was on that ship on the date of the accident?

A. The Goodyear type.

Mr. Riley: Would the bailiff show the witness Plaintiffs' Exhibit 13?

The Court: That will be done. [311]

(The exhibit was handed to the witness.)

Q. (By Mr. Riley): Do you know whether or not this was the type of folder which was installed aboard Ship 601 before it departed for the Orient?

A. No, I couldn't answer that question.

Q. Do you know whether or not this was the type that was in use in January of 1952?

A. There doesn't seem to be a printed date on this folder that I can see, so I do not know.

Q. Referring to the exhibit, would you indicate where the life rafts are supposed to be located in accordance with the exhibit?

A. According to this folder?

Q. Yes.

A. This folder here lists two twenty-man life rafts forward of the cabin door on the left-hand side.

(Testimony of Alvin B. Opsahl.)

Q. Do you know where the life rafts were located in Ship 601?

A. Not without looking at the Service Bulletin and other information.

Mr. Riley: Would the bailiff show the witness Exhibit 14?

The Court: That will be done.

(The exhibit was handed to the witness.)

The Court: You should say whether it is [312] Plaintiffs' or Defendant's.

Mr. Riley: Thank you, your Honor. Plaintiffs' Exhibit 14.

A. Well, this chart here for the short time I've looked at it doesn't show the location of the life vests, or life rafts, rather.

Q. (By Mr. Riley): I direct your attention to the center bottom portion of the exhibit, and ask you to read to yourself what reference is made to Ship 601, and see if you are able then to determine the location of the life rafts in Ship 601, according to Plaintiffs' Exhibit 14?

A. This last line is incorrect.

The Court: I believe that is not in the question. That might come out—if the question should be asked, then comment if you feel there is some comment needed.

A. Would you repeat that question, please?

Mr. Riley: Will the reporter read the question back?

(The reporter read the question as follows:

“Q. I direct your attention to the center bot-

(Testimony of Alvin B. Opsahl.)

tom portion of the exhibit, and ask you to read to yourself what reference is made [313] to Ship 601, and see if you are able then to determine the location of the life rafts in Ship 601, according to Plaintiffs' Exhibit 14?")

A. I would be unable to.

Q. (By Mr. Riley): Is there anything on that exhibit which enables you or in the center portion of it which enables you to locate the life rafts according to Plaintiffs' Exhibit 14? A. No.

Mr. Riley: May Plaintiffs' Exhibit A-15 be handed to the witness, please? That's the Pre-Trial Order.

The Court: That will be done.

(The exhibit was handed to the witness.)

The Court: I think the Court ought now to detach it from the Pre-Trial Order.

Mr. Riley: I think perhaps it should be, your Honor. It's been admitted as an exhibit.

The Court: At this time and following its admission in evidence during this trial, Plaintiffs' Exhibit A-15 is now detached from the Pre-Trial Order previously in part identifying it, to which Pre-Trial Order that exhibit was attached, and it may hereafter be admitted, filed and kept as any other exhibit is, independent of the Pre-Trial Order.

Q. (By Mr. Riley): Will you examine the sketch attached to Exhibit A-15, and tell us what you are able to determine as to the location of life rafts aboard Ship 601?

A. Yes. As per the sketch here, the two life rafts

(Testimony of Alvin B. Opsahl.)

are aft of the cabin door on the left-hand side.

Q. Now, what other rafts are stowed aboard the aircraft?

A. We had a fifteen-man raft, or we did have a fifteen-man raft in the companionway. That's in the control cabin of the aircraft.

Q. What installations are inside the control cabin?

A. You mean all the installations?

Q. Yes.

A. Oh, we have the cockpit—I mean, we have a seat for the pilot, a seat for the co-pilot and navigator, and the radio rack is right behind the left-hand part of the control cabin, and we have cabinets there for various manuals. The raft is kept up in that area.

Q. How is the raft stowed in that cabin secured? Can you tell from referring to the sketch?

A. Yes. According to the sketch, this fifteen-man raft is stowed on the right-hand side of the control cabin. [315]

Q. Is it held in place by any installation of any kind?

A. This says, "No tiedon." Where there's no tiedon, it's evidently in a cabinet where you can slip the raft in and out. This raft is crossways in the fuselage or the control cabin of the aircraft, so in danger of ditching this raft would not move out of its location.

Q. What would happen to it if it were not in a cabinet?

(Testimony of Alvin B. Opsahl.)

A. If it were not in a cabinet, not tied down?

Q. Yes. A. Well, it would shift.

Q. And on impact could you describe what might happen to it?

A. Well, the only thing I would know is what I have read in the newspapers of these ditchings the last few years.

Mr. Koch: Just a minute, please.

The Court: Do not say what you have read in newspapers.

Ask him another question.

Q. (By Mr. Riley): Have you ever attended ditching school as conducted by the defendant airline? A. No.

Q. Do you know why the rafts are installed, their purpose? A. Yes. [316]

Q. Does the defendant airline have any training course for its supervising safety inspectors, to familiarize them with the problems of survival in the case of an abandon-ship operation, or ditching?

A. We have no instructions for training the supervisor, like myself. We have training for our pilots, co-pilots, flight engineers, stewardesses, stewards, very elaborate training.

Q. Would you estimate the weight of this raft?

A. This fifteen-man raft?

Mr. Koch: Just a minute, please.

Your Honor, the raft weights appear right on the exhibits, and I think that's the best evidence.

The Court: The objection is overruled.

(Testimony of Alvin B. Opsahl.)

A. A fifteen-man raft is 88 pounds.

Q. (By Mr. Riley): And what are the weights of the twenty-man raft?

A. A twenty-man raft is 110 pounds.

Q. Do you know whether or not these will float when they are not inflated?

A. I don't know.

Q. I didn't understand.

A. I don't know. [317]

Q. Are your stewardesses training to lift these things alone? A. No.

Q. Could a stewardess ordinarily be expected to lift one of these rafts?

Mr. Koch: I object to the question, your Honor.

The Court: The objection is overruled. You may answer.

A. It's a two-man job to lift any raft. It could be done in an emergency.

Q. (By Mr. Riley): What emergency lighting was installed in Ship 601 before it departed for the Orient?

A. The way I remember that, there was two emergency lanterns in that aircraft that came with the aircraft from TWA in Kansas City, Missouri.

Q. What kind of lanterns are they?

A. They are manually controlled flashlight lanterns, flashlight battery lanterns.

They are approximately, oh, three inches wide by five inches tall, and about an inch and a half deep.

(Testimony of Alvin B. Opsahl.)

Q. These are flashlights, in effect. How many cells?

A. I imagine—I don't know for sure. [318]

Mr. Koch: I object again to Counsel testifying as to what kind of lights they are.

The Court: That objection is sustained. Avoid any statements like that.

Q. (By Mr. Riley): Do you know where these were stowed?

A. One was stowed in the front of the cabin, and the other was stowed by the main cabin door.

Q. Do you know whether this installation was as required by Civil Aeronautics regulations?

A. Yes.

Q. Do you feel that this is a sufficient supply of emergency lighting in an aircraft?

Mr. Koch: I object.

A. At that time, yes.

Mr. Koch: Just a minute. When I object, I wish you wouldn't answer the question.

The Witness: Okay.

Mr. Koch: I object, your Honor, because this man is not an expert, and what he feels isn't relevant to the issues of this case, or properly admitted in evidence.

The Court: The objection is overruled. I believe the witness already answered it.

Mr. Koch: I didn't hear the answer.

The Court: Will you read it? [319]

(The reporter read the last answer.)

The Court: Court will now be at recess until one-thirty.

I wish all those connected with this case to return when for further proceedings.

(Thereupon, at 12:00 o'clock noon, a recess herein was taken until 1:30 o'clock, p.m.) [320]

Thursday, March 28, 1957, 1:30 O'Clock, P.M.

(All parties present as before.)

The Court: Mr. Koch, did you have something?

Mr. Koch: Your Honor, may Mr. Pitcher be excused?

The Court: Is there any objection?

Mr. Riley: No objection, your Honor.

The Court: Mr. Pitcher may be excused, and may return to his work if that is his wish.

(There was a discussion with reference to excusing the witness Cox.)

Mr. Riley: At this time, if the Court please, I would like to interrupt the testimony of Mr. Opsahl, and I would like to ask permission for Mr. Murphy, my co-counsel, to examine Mrs. Bloth, who is here from Alamogordo, New Mexico.

The Court: You may do that.

Mr. Riley: And of course when Counsel completes his cross examination, he may examine her as his own witness in cognizance of the fact that she will not be present later, and we will ask that she be excused at the conclusion of her testimony today. [321]

The Court: Will you please call this witness now.

Mr. Riley: Mrs. Bloth, please.

The Court: Co-counsel may interrogate this witness.

FYRN BLOTH

called as a witness by plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Murphy): Will you state your name for the record? A. Fyrn Bloth.

The Court: I did not get it, I am sorry.

A. Fyrn Bloth.

The Court: F-e-r-n?

A. F-y-r-n B-l-o-t-h.

The Court: Fyrn Bloth?

A. Yes, sir. [322]

The Court: You may proceed.

Q. (By Mr. Murphy): And your residence now?

A. Alamogordo, New Mexico.

Q. Would you spell that for the Court, please?

A. I'm a little nervous. Alamogordo, New Mexico, A-l-a-m-o-g-o-r-d-o.

Q. Mrs. Bloth, you were acquainted with John Waldrop, Sergeant John Waldrop?

A. He was my brother-in-law.

Q. Your brother-in-law? A. Yes, sir.

Q. Were you acquainted with him at that time before January 19, 1952? A. Yes, sir.

Q. And why was it that you were acquainted with him?

A. Well, he married my sister.

Q. And what was your sister's name, please?

Testimony of Fyrn Bloth.)

A. Her name before she married was Lola Faye Kelley.

Q. Her first name again?

A. Lola Faye Kelley.

Q. And she was called by what? A. Faye.

The Court: And likewise your maiden name was Kelley, was it?

A. Yes, sir. [323]

Mr. Murphy: Thank you, Your Honor.

The Court: And Mr. Waldrop, the deceased, married your sister, is that right?

A. Yes, sir.

The Court: Was he the husband of your sister at the time of his death? A. Yes, sir.

Mr. Murphy: Thank you, Your Honor.

Q. (By Mr. Murphy): What time was it that Sergeant Waldrop married your sister?

A. Do you want the date?

Q. The approximate date.

A. They were married March the 3rd, 1951.

Mr. Murphy: If the Court please, I would like to offer this for identification.

The Clerk: It will be Plaintiffs' Exhibit No. 16.

(A marriage license was marked Plaintiffs' Exhibit No. 16 for identification.)

Q. (By Mr. Murphy): Plaintiffs' Exhibit No. 16, Mrs. Bloth, will you identify it, please?

The Court: May I suggest that one of the proper form questions to seek that information is, "State what, if you know, that is."

(Testimony of Fyryn Bloth.)

Q. (By Mr. Murphy): Will you state what that is, if you [324] you know, Mrs. Bloth?

The Court: What kind of an instrument is it? What do you call it?

A. It's a marriage license.

The Court: Is it a license?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Murphy): And to whom, if anyone, was that license made out?

Mr. Koch: I object, Your Honor. The exhibit is not in evidence.

The Court: That objection is sustained.

Q. (By Mr. Murphy): Would you please, Mrs. Bloth,——

The Court: You can ask her of what persons, if any, she knows were the ones referred to in that exhibit, if you wish something like that, without asking her the contents of it.

Q. (By Mr. Murphy): What persons, if any, are referred to in that exhibit?

A. It's the license for rites of matrimony for John Milton Waldrop and Lola Faye Kelley.

Q. What date if any is referred to on that instrument, please?

A. Do you want the completion date?

The Court: No, just state if you know the [325] date when the license was issued, if it was a license.

A. The license was issued the 27th day of February, 1951.

The Court: State what if anything else in the

(Testimony of Fyrn Bloth.)

way of the ceremonial part of it took place in pursuance of the license so far as that instrument indicates. Don't read the words out loud of the paper.

A. Well, the ceremony was performed by——

The Court: What kind of a ceremony?

A. The marriage ceremony was performed on March the 3rd, 1951.

The Court: Is that the same day, as you understand it, as the date of the issuance of the license?

A. No.

The Court: Or later?

A. It's later.

The Court: Very well.

Q. (By Mr. Murphy): Did you give me that instrument that you now have before you, Mrs. Bloth?

A. Yes, I did.

Q. Where was it that you obtained it?

A. In my sister's papers.

Q. And by "your sister" you are referring again to whom? [326]

A. Faye Waldrop.

Mr. Murphy: If the Court please, I would like to offer that exhibit, Plaintiffs' Exhibit No. 16, into evidence.

Mr. Koch: May I examine it, your Honor?

The Court: You may look at it.

(The exhibit was handed to Mr. Koch.)

Mr. Koch: Is this the original license that was issued by the officials of Texas?

A. Well, I suppose it is.

(Testimony of Fyrr Bloth.)

Mr. Koch: Or is this a copy that you obtained from the Registrar of Licenses in Texas?

A. I wouldn't know. I didn't obtain it, I just found it in her papers.

Mr. Koch: Your Honor, I object to this exhibit because it shows right on the face of it that it was received—no, I believe I'm in error. If this is an original certificate I have no objection to it. I just don't know.

The Court: Were you able to find any other certificate or document issued by a public official which purported to be a license or a certificate of marriage ceremony celebrated in pursuance of any license? [327]

A. Well, I don't have the certificate of marriage, sir, but I do have another copy, but I believe that it's a typewritten copy. May I get it?

The Court: Yes, you may step down. See what other copies you have. Let your Counsel, Mr. Murphy, see them. Let him see them, please.

A. O. K. It's a typewritten copy.

(Brief pause.)

The Court: Let Mr. Koch compare these two. The one with the tab is the exhibit, the other is not.

Mr. Murphy: I believe this is just a typewritten copy, Your Honor.

The Court: Note that filing mark down below, Mr. Koch, on the left-hand corner of Plaintiffs' Exhibit 16 for identification.

Mr. Koch: Yes, Your Honor.

(Testimony of Fyrn Bloth.)

The Court: That indicates, does it not, that it is an official document?

Mr. Koch: I think it does, Your Honor. It would appear to be.

The Court: The chances are—let me see it. Does it show any recording citation?

Mr. Koch: No, Your Honor.

The Court: For the life of me I do not see how it could be—— [328]

Mr. Koch: It looks like a license that was never filed, Your Honor.

The Court: And yet—I believe that what has been marked and tendered for marking as Plaintiffs' Exhibit 16 is the original marriage license and the original certificate of the celebration of the rites of marriage between John Milton Waldrop and Lola Faye Kelley, and I believe that the second paper is merely in part a——

Mr. Koch: It appears to have recorded information on the second one, Your Honor.

The Court: ——a copy of the first, and I suspect that at the request of the parties, in pursuance of the practice in the local office where licenses and certificates of marriage are filed finally after the performance of the marriage ceremony, that there has been used for recording a copy of the original and the original was left in the possession of the parties.

Mr. Clerk, continue to use this paper and do not use any filing mark. It is possible that eventually someone will wish to substitute a copy of this

(Testimony of Fyrn Bloth.)

Plaintiffs' Exhibit 16, and I call your attention to the fact that what Mrs. Bloth referred to as a copy is not because the certificate on the back page is not filled out by the County Clerk. There is something [329] about it. The two forms are not exactly one and the same, while the printing on them is the same.

I return to the witness the so-called copy that she mentioned. It may be that the original is of vital interest to the witness or to someone representing the parties to this marriage in some other place, like possibly Texas or New Mexico, or wherever either one of such parties may be.

Is your sister living?

A. No, sir, she is deceased.

Mr. Murphy: This is admitted in evidence, Your Honor?

The Court: There being no objection, Plaintiffs' Exhibit 16 is now admitted.

(Plaintiffs' Exhibit No. 16 for identification was admitted in evidence.)

Q. (By Mr. Murphy): Did Faye Waldrop and John Waldrop have any children?

A. Yes, they had one daughter.

Q. And what was her name, please?

A. Judith Ann Waldrop.

Q. Judith Ann?

A. Judith Ann Waldrop.

Q. And is the young girl sitting back here that girl?

A. Yes, that's Judy sitting back there. [330]

(Testimony of Fyrr Bloth.)

Q. And what is Judith Ann's age now?

A. She was five in January.

Q. She was five in January? A. Yes.

The Court: Which of the persons mentioned is the daughter of the decedent persons John Milton Waldrop and Faye Waldrop, the smaller of the two or the larger one?

A. The little girl.

The Court: That little girl, about five years old? A. Yes, sir.

The Court: That is sufficient. Thank you very much. I have no objection to your letting her sit in the—let her come up here and sit in these chairs, both of you. Would the lady come with the little girl?

(A lady and little girl took seats in the jury box.)

The Court: What is her name now, the little girl's name?

A. Judith Ann. We call her Judy.

Q. (By Mr. Murphy): Were there any other children born to the— A. No. [331]

Q. At what time was this birth?

A. The 22nd of January, 1952.

The Court: Do you spell it A-n-n or a different way? A. A-n-n, yes, sir.

The Court: Born when, please?

A. January 22, 1952.

The Court: 1952? A. Yes, sir.

The Court: You may inquire.

(Testimony of Fyrn Bloth.)

Mr. Murphy: Would the clerk please mark this for identification.

The Clerk: It will be marked Plaintiffs' Exhibit No. 17.

(A birth certificate was marked Plaintiffs' Exhibit No. 17 for identification.)

Q. (By Mr. Murphy): Can you identify that document, Mrs. Bloth?

A. It's a certificate of birth.

Q. Is it certified? A. Yes.

Q. By whom?

A. By M. D. Hornedo, H-o-r-n-e-d-o. He's in the Health Department, Department of Vital Statistics.

Q. If there's a date on it, would you—— [332]

A. January 22, 1952.

Q. And that is the date of birth on the document before you?

A. The date of birth, yes, sir.

Mr. Murphy: If the Court please, I would like to enter Plaintiffs' Exhibit No. 17 in evidence. It's a certificate of birth.

Mr. Koch: No objection.

The Court: Admitted.

(Plaintiffs' Exhibit No. 17 for identification was admitted in evidence.)

Q. (By Mr. Murphy): And whose certificate of birth was that?

A. Judith Ann Waldrop's.

Q. And the parents indicated therein are who?

(Testimony of Fyrn Bloth.)

A. John Milton Waldrop and Lola Faye Waldrop.

Q. Thank you. Would you state again the date of the birth? A. January 22, 1952.

Q. And what day was it that the deceased John Waldrop died? A. January 19, 1952.

Q. The birth was after his death?

A. That's right.

Mr. Murphy: May I have this marked for [333] identification, please.

The Clerk: It will be marked Plaintiffs' Exhibit No. 18.

(A Certificate of Honorable Service was marked Plaintiffs' Exhibit No. 18 for identification.)

Q. (By Mr. Murphy): Mrs. Bloth, can you identify that instrument you have in your hand?

A. It's from the Army of the United States and it's an honorable service and it certifies that Sergeant John M. Waldrop died while in the service.

Mr. Koch: I object to this testimony, Your Honor. It's just a matter of identification.

The Court: Yes, I think so.

Mr. Murphy: If the Court please, I would like to offer Plaintiffs' Exhibit No. 18 into evidence.

Mr. Koch: Was that sent to you, Mrs. Bloth?

A. No, it was sent to my sister.

Mr. Koch: How does it come into your possession?

A. Because I have my sister's possessions.

(Testimony of Fyrn Bloth.)

Mr. Koch: I don't have any objection to it, Your Honor.

The Court: It is admitted.

(Plaintiffs' Exhibit No. 18 for identification was admitted in evidence.) [334]

Mr. Murphy: I would like to have this marked for identification.

The Clerk: It will be marked Plaintiffs' Exhibit 19.

(A Certificate of Baptism was marked Plaintiffs' Exhibit No. 19 for identification.)

Q. (By Mr. Murphy): Can you identify that?

A. It's a Certificate of Holy Baptism.

Q. Whose certificate?

A. Judith Ann Waldrop's.

Q. Is there a date?

A. On the 7th of June, 1952.

Q. Were you present at the time that certificate was issued? A. No, I wasn't.

Q. Does it show the parents, if any?

A. John Milton Waldrop, Lola Faye Waldrop.

Mr. Murphy: Plaintiff offers Exhibit No. 19 in evidence.

The Court: I do not know what you want it in evidence for.

Mr. Koch: I object to it, Your Honor. It is completely beyond any issues in this case. It is subsequent to the time of the decedent's death. The [335] child is here in court. The identification wasn't made by anybody in her presence when the

(Testimony of Fyrn Bloth.)

baptism was performed and took place, and I can't see that it's anything but self-serving.

The Court: I do not see the materiality of it.

Mr. Murphy: If the Court please, we intend to prove some of the manner of being of the deceased and his family, the nature of his——

The Court: We are not concerned with his family. It is he.

Mr. Murphy: And his wife after his death.

The Court: This objection is sustained.

(Plaintiffs' Exhibit No. 19 for identification was refused.)

Mr. Murphy: I will withdraw the exhibit, if the Court please.

The Court: Is there any objection?

Mr. Koch: None, Your Honor.

The Court: It is withdrawn and will be physically returned to the Counsel who offered it.

Q. (By Mr. Murphy): Do you know where John Waldrop died? A. Well, I——

Mr. Koch: I object, Your Honor. The answer must necessarily call for a hearsay response. [336]

The Court: I do not see how there is any escape from that.

Mr. Murphy: The question is withdrawn. Strike it, please.

The Court: Is there any dispute about the fact of his being a passenger on the plane?

Mr. Koch: There had been at one time, but I don't believe there is any issue on that now.

(Testimony of Fyrr Bloth.)

Mr. Murphy: It was my understanding that there was a dispute, your Honor.

The Court: Then the Court will take it as admitted that he was at the time of the landing of this plane in question at Sandspit, Alaska, a passenger on board that plane and that his body has not been since found or accounted for. Is that the fact?

Mr. Koch: No, Your Honor. As I understand it his body was found and was returned and buried.

The Court: Then with that understanding—

Mr. Koch: Isn't that true, Mr. Riley?

Mr. Riley: Yes, as long as that is our understanding. At one time Counsel wouldn't even admit that this man was killed in the airplane.

The Court: Well, he does admit it now.

Mr. Riley: If it is admitted now we are happy to withdraw the question. [337]

The Court: Very well.

Mr. Koch: Your Honor, the military service record that was obtained and is in the court's files discloses these things, and now that we know that we don't question it further.

The Court: Let the record show that the decedent Waldrop was a passenger on board this plane at the time of the accident and lost his life in that connection.

Q. (By Mr. Murphy): What was Sergeant Waldrop's rank at the time of his death?

A. He was a sergeant first class.

(Testimony of Fyrn Bloth.)

Q. And how long had he been in the Army prior to his death?

A. Well, I believe he had been in the Army—you mean the U. S. Army?

Q. Yes.

A. About ten years, or was it three years—three years actually in the Army.

Q. Was he in other services, is that what you mean?

A. Yes. He was in the Marine Corps, and I don't know whether the merchant marines is considered a branch of the Army or not, or a branch of the service.

Q. Was he in the merchant marine?

A. He was in the merchant marine. [338]

Q. Approximately how long was he in the merchant marine?

A. All three together he was in approximately ten years, in the three that I named.

Q. Are you married, Mrs. Bloth?

A. Yes, I am.

Q. And how long have you been married?

A. It will be eight years this June.

Q. To the present Mr. Bloth?

A. That's right.

Q. And when was your marriage, approximately?

Mr. Koch: I object, Your Honor. I can't see the materiality of that.

The Court: What difference does that make, Mr. Murphy?

(Testimony of Fyrn Bloth.)

Mr. Murphy: Your Honor, I'm trying to establish the family relationship of Judy Ann, where she is living now.

The Court: The only family relationship that we are concerned with I think is with the deceased, as between the deceased and his survivors.

Mr. Murphy: Well, it bears, Your Honor, upon some of the issues which must be presented here, I believe, and that goes to the expenses, what it takes to take care of the child where she is living now, how she is being provided for and the home she is in. [339]

The Court: The cost is all that we are concerned with. Nobody is disputing the fitness of the child's present surroundings, I am sure. I think it might be of some interest, if there is admissible testimony concerning the usual and normal cost of the support that is normally required by the survivors of the decedent and how long that will continue, or something to that effect, and what her education may cost, and things like that, Mr. Murphy. That is the thing we are concerned with, I believe.

Q. (By Mr. Murphy): Do you have any children, Mrs. Bloth?

Mr. Koch: I object to that too, your Honor. Whether she has children or not is immaterial.

The Court: The objection is sustained.

Mr. Murphy: If the Court please, Mrs. Bloth we will tend to show will testify as to the expenses as has been pointed out here of raising a child,

(Testimony of Fyrr Bloth.)

and necessarily she must have experience in those expenses and at different ages of children, and her experience will reflect if she has children of her own by which to compare it.

The Court: The objection is sustained.

Q. (By Mr. Murphy): Does Judy Ann live with you at this time?

A. Yes, she does. [340]

Q. At your home? A. That's right.

Q. Which is in New Mexico, as you stated, Alamogordo?

A. Alamogordo, New Mexico.

Q. Was Judy Ann's mother, Faye Waldrop, living at the time of Sergeant Waldrop's death?

A. Yes, she was.

Q. Is she living now?

A. No, she's deceased.

Q. How long after the death of Sergeant Waldrop did she die?

A. She died on March the 29th following his death the previous year on January the 19th.

The Court: It was a little more than a year, is that right? A. Yes, sir.

The Court: What was the date in March?

A. March 29th.

The Court: From the 19th of January to March 29th would be the excess over and above the year that she lived after his death, is that correct?

A. That's right.

Q. (By Mr. Murphy): What was her health at the time of his death?

(Testimony of Fyrn Bloth.)

A. Well, she was expecting Judy Ann and she wasn't in [341] good health. She had a heart condition.

Q. Had she had the heart condition very long before his death?

Mr. Koch: Now, I object to the form of the question, Your Honor. It's leading and——

The Court: Evidence of the extent of damages, that is all this evidence is about, is it not?

Mr. Murphy: Yes, Your Honor. It is our intention, Your Honor——

The Court: How could that bear on what that person was entitled to?

Mr. Murphy: The question bears——

The Court: Would that augment the amount in any way?

Mr. Murphy: We believe so, Your Honor, in that we intend to prove hospital and doctor bills necessary to the care of the deceased's wife after his death which would take away from the care of the child after his death.

Mr. Koch: Well, that's——

The Court: The objection is sustained. May I invite Counsel's attention, when they can reasonably get to it, the Court's desire to hear any evidence that may bear on the cost of the proper care and custody and training, including all reasonable training and [342] including certainly her education, as to this child.

Mr. Murphy: Yes, Your Honor.

The Court: That is very important.

(Testimony of Fyrn Bloth.)

Mr. Murphy: Yes, Your Honor.

Q. (By Mr. Murphy): Has Judy Ann been living with you ever since her mother's death?

A. She has either lived with us or in a house of ours ever since her—in the same town.

Q. In the same town?

A. With her grandparents.

The Court: Would that be your parents?

A. Yes, sir.

Q. (By Mr. Murphy): Then at some times I take it she lives with you and at other times with them. On what occasions if any does she live with them?

A. Well, she lived with them for a period of about two years, but their health is not so that they are able to maintain a home of their own now, so they are all with us.

The Court: Do you have children of your own?

A. Yes, I have a little five year old girl and a sixteen year old girl.

Q. (By Mr. Murphy): At the time when they are not able to provide for her when their health is in a serious condition where they can't, where does Judy Ann stay then? [343]

A. Well, when my mother isn't able to watch after them I take them to a nursery school or the kindergarten, whatever you want to call it.

Q. Do you work, Mrs. Bloth?

A. Yes, I do.

Q. And does your husband? A. Yes.

Q. Do they take care of the child, I mean by

(Testimony of Fyrn Bloth.)

"them" the grandparents, your parents, take care of the child when they can when you're working? Is that the procedure?

A. That's right, yes.

Q. And how long do you work each day?

A. I work eight hours, a five day week.

Q. Five day week, eight hours a day?

A. Yes, sir.

Q. You say you take them to a kindergarten then at times when the grandparents aren't able to provide for them? A. That's right.

Mr. Koch: Your Honor, I think the question should be a little more objective instead of by Counsel.

The Court: Yes, I think so. Ask her.

Mr. Murphy: I thought I had established that point, Your Honor. I was just going over it.

Q. (By Mr. Murphy): When they are——

The Court: If you have already established it, do not ask her any more. In connection with my sustaining the objection I was advising you of what the proper form might be. If you have already established it, do not go over it any more.

Q. (By Mr. Murphy): Does this having the children in kindergarten happen very often or not?

A. Well, by "often"—Mother has had a major surgery and I've had them in kindergarten——

Mr. Koch: I object as not responsive, Your Honor. She was just asked how often.

The Court: Maybe that, if needed, will come out in some other way. How often, can you state directly, Mrs. Bloth?

(Testimony of Fyrn Bloth.)

A. Well, I had them recently about two months in kindergarten. I don't know exactly how I can say how often because it depends on Mother's health, and I don't know exactly how that's going to be in the future, you know.

The Court: How old is she?

A. Seventy-one. She'll be seventy-two in August.

The Court: In your part of the country do you know what it would cost to maintain her in an approved school with proper arrangements and surroundings [345] and care that would be equal or comparable to the kind of care she is receiving now at your home and/or at your father's and mother's home? Have you any idea what it would cost to provide that same kind of care in any other home or school or boarding school or institution, church school or state school or whatever school might be available?

A. Well, I've never priced any school. It would just be an estimate. I don't think you possibly——

The Court: Have you any idea of what it costs you and your husband to give the care that you believe this child receives? In your own mind you might compare what it costs to provide the home that you do provide for your own daughter about the age of this Judy Ann.

A. Well, I'd make an estimate of about a hundred dollars a month. I've never kept any record.

The Court: That is sufficient.

Mr. Koch: I didn't get the answer, Your Honor.

(Testimony of Fyrrn Bloth.)

The Court: She said she would make an estimate of about a hundred dollars a month but that she had not kept records of expenses.

Q. (By Mr. Murphy): Is that cost of a hundred dollars a month for a cost at what age? [346]

A. Well, their present age. Of course they will be going to school year after next.

Q. Their present age being—— A. Five.

Q. Five? A. Yes.

Q. Would this cost increase or decrease or change as the child got older?

A. Well, it will increase, naturally.

Q. Would you speak a little louder, Mrs. Bloth?

A. I'm sorry. It will increase, naturally, as they grow older.

Q. This \$100 a month cost which you referred to, could you explain what that would entail in the way of expenses included in the \$100?

A. Well, there will be their food and lodging, their clothing, and oh, birthdays, Christmases, all the things that children nowadays demand, or not demand, but you want them to have.

Q. Was there any cost or is there any cost when you have the child Judith Ann at kindergarten?

A. Yes, there's a charge of \$2.00 a day per child.

Q. Does that charge include food?

A. It includes their lunch only.

Q. Does the charge—does the cost that you estimated at [347] \$100 a month for the care of

(Testimony of Fyrn Bloth.)

the child include medical and dental and other expenses such as that?

A. Well, they might ordinarily, but Judy has an unusual amount of medical expenses.

The Court: What is her state of health, if you know?

A. She's an asthmatic and she has a number of allergies. She has—right now we're facing a tonsillectomy.

Q. (By Mr. Murphy): Does she take shots or other treatment?

A. She has for asthma. She isn't at the present time.

Q. Could you describe that asthmatic treatment, or not treatment, but condition, and some of the ramifications, if any?

Mr. Koch: I object, Your Honor. The issue that is relevant has been covered.

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

The Court: The objection is overruled. If you know what they are, will you state it?

A. Well, we've had her in Oklahoma City and taken her through the clinic there and they prescribed treatment and determined her allergies, and at the present time they believe that she doesn't need treatment, but it's [348] always subject to stir up. We have to be very careful. Any cold could go into an asthma attack.

Q. (By Mr. Murphy): Are these attacks—what is the reaction, if any, to these attacks?

(Testimony of Fyrn Bloth.)

A. Oh, she's very nervous, very—well, she can't sleep. I mean you have to sit up with her all night and she coughs and chokes and can't breathe.

Q. Could you say there has been an average month of medical expense for these conditions you just described?

Mr. Koch: I object to the form of the question.

The Court: Sustained. You can ask her if she knows how much it has been.

Q. (By Mr. Murphy): Do you know how much the medical expenses have been for the treatment you have described?

A. Well, I would say they would average out about ten dollars a month over a year.

Q. That's in addition to the—or is that in addition or a part of the \$100 a month that you specified before?

A. No, that's in addition.

Q. At what age will Judy Ann—do you intend to take Judy Ann and put her in school?

A. Yes. She'll start to school in September after she's six in January.

Q. I see.

The Court: Will that be this fall?

A. No, sir, it will be a year from this fall.

The Court: So that she will not have her sixth birthday before 1958, is that right?

A. Well, let me see. Well, she's five now, 1957. She'll be six, yes, in 1958. She won't start to school until—well, she'll start to school in the fall after she's six.

(Testimony of Fyrn Bloth.)

The Court: She has had her fifth birthday only this past January?

A. This past January, yes. No, it will be '59——

The Court: So it will be '58 before she has her sixth birthday?

A. Yes, sir.

The Court: And after that you say she will not be admitted to school where she lives until the September following as a regular pupil in school?

A. Well, she was five in '57. She'll be six in——

The Court: In '58 in January. [350]

A. Well, it must be seven when they go to school.

The Court: She might go to school this fall, do you think, might be admitted to school this fall?

A. No, because she's only five now.

The Court: That is right. You are right. Then I guess I am wrong.

A. It will be a year from this September that she'll go to school.

The Court: You may proceed.

Q. (By Mr. Murphy): What are your actual expenses now just as to Judy in the way of clothing?

Mr. Koch: Your Honor, I object to the question. Mrs. Bloth already testified that she didn't keep records, and her estimate was \$100 a month inclusive of clothing and all the other things.

The Court: You might inquire further, if there is any doubt about it, whether the hundred dollars she has already mentioned as an estimate includes clothing.

(Testimony of Fyrn Bloth.)

Q. (By Mr. Murphy): Does the \$100 that you have already estimated a month include such things as clothing and food?

A. Yes, it includes the essentials, clothing, food, [351] shelter.

Q. Are there child welfare departments or agencies where you live? A. Yes, sir.

Q. Do you know what they allow for a child of Judy's age in the way of expenses in a foster home?

Mr. Koch: I object to the question, Your Honor. There is no evidence that she's been in a foster home and the answer would be hearsay.

Mr. Murphy: Your Honor, we intend to show——

The Court: I would be inclined to think the information would be pertinent, but I am not sure whether she is qualified to answer or not. You might ask her whether she has made any investigation about it.

Q. (By Mr. Murphy): Have you made any investigation?

A. Yes, I did. I asked my attorney there in Alamogordo one time what the allowances were, and he said \$75 a month.

Mr. Koch: I——

The Court: Yes, it will have to be stricken, what he said, Mrs. Bloth. A. Oh.

The Court: But it might be different if you care to ask her that she feels that she knows anything about the cost and if she has an opinion as

(Testimony of Fyrn Bloth.)

to what it [352] costs, then that might be material, might be admissible.

Q. (By Mr. Murphy): Do you have an opinion and know what allotment these agencies will give, if any? A. \$75 a month.

Mr. Koch: May I ask a question at this point, Your Honor?

The Court: You may do so on cross examination, not now, Mr. Koch.

Q. (By Mr. Murphy): What is the nature and what would it cover, this expense of \$75 a month?

Mr. Koch: I object, Your Honor. I don't believe that there has been any proper foundation laid for the questions about foster home care. It's just heaping one——

The Court: Do you insist upon pressing the matter? She has already been permitted to say what she believes it would cost upon the investigation she has made. She said \$75 a month to keep her in a foster home. That seems to cover it.

Mr. Murphy: Very well, Your Honor.

Q. (By Mr. Murphy): What expenses do you contemplate changing, as you stated before they would, when Judy Ann reaches school age, grammar school age?

A. You mean additional expenses?

Q. Yes, additional, if there are any. [353]

Mr. Koch: I object to that question too, your Honor. I don't think there is any basis for presently estimating the cost of expenses that are two years hence.

(Testimony of Fyrn Bloth.)

The Court: The objection is overruled, but I am not sure that she could be permitted to state what the cost at that stage in the future might be, Mr. Murphy, but if she can answer the question directly she may answer. Read the last question that is before the witness.

(The reporter read the last two questions.)

A. Well, there will be additional clothing, naturally. At the present time I keep the children in jeans, and there will be a dress a day, there will be additional wear and tear on their clothes, I suppose. There will be lunches and transportation, all the additional expenses that goes with sending a child to school.

Q. (By Mr. Murphy): What does it cost you to send your own daughter to school additional?

Mr. Koch: I object to the question, unless there is some evidence that there are records of such expense maintained.

The Court: In the first place you should ask her to give information like that only if she knows. [354] It would be much more appropriate for you to ask her if she has any information about it. Then if she indicates in the affirmative, then it would be appropriate to ask her something about it. Try to have these fundamentals in mind, Mr. Murphy, please. In other words, if you ask a person like me that question it wouldn't be competent for me to answer because I have not investigated it sufficiently to do so.

Mr. Murphy: I thought, your Honor, that——

(Testimony of Fyrn Bloth.)

The Court: Find out from her if she knows about this. If she does, you may go into it.

Mr. Murphy: Well, Mr. Riley probably—would it be all right for Mr. Riley to ask her?

The Court: I would rather you to proceed now. The arrangement was for you to interrogate this witness.

Q. (By Mr. Murphy): Do you know what it costs to send and maintain a girl in grammar school?

A. Well, I have a daughter that's a sophomore in high school and naturally I put her through grammar school. As I say, I don't keep records of it, but I can make an estimate.

Q. Well, based upon what you know would you please say what they are? [355]

Mr. Koch: I object, your Honor.

The Court: You said, "State what they are." She may state what her estimate is based upon what she has done, and if you wish to register an objection to it, you may.

Mr. Koch: I do object, your Honor.

The Court: Wait until he has finally stated the question and then you may make your objection.

Q. (By Mr. Murphy): Based upon what you know would you estimate what the additional costs are to maintain a girl in grammar school?

A. Well, I would say—

The Court: Now wait just a moment.

Mr. Koch: Your Honor, I'm forced to object. I think that if this testimony could come in it

(Testimony of Fyrr Bloth.)

would be of benefit to everybody, but the way it is presented, she testifies first that she doesn't know and hasn't kept records of the cost of maintaining a little child, but she estimates that at \$100 a month and enumerates the things that it covers, and that's difficult for her to do because of the physical condition of the child fluctuating, and so on. Now she is asked to project expenses which she is not presently incurring to a time two years hence when expenses in the form of transportation to school, [356] lunches and different clothes will become involved.

We are not considering the fact whether they are public schools, whether they are private schools, whether there is any free transportation or not, whether the lunches aren't lunches she is presently paying in her kindergarten tuition, and now she is using as a basis of comparison what it costs her to keep a child who is in high school in high school, and I don't understand how this estimate can take into account the cost of apportioning these joint expenses of the shelter and home among the three children, the husband and herself, and I can't feel that this testimony is of any value.

The Court: I think you have covered it sufficiently.

Mr. Murphy: If the Court please, this is a mother. She has a daughter of comparable age. She has one in school. Is she an expert? She is.

The Court: The Court believes that she will confine her statement to her estimate, and she does

(Testimony of Fyrn Bloth.)

not intend to say that these are absolute facts. It amounts to no more than her opinion, which is not binding upon the Court. [357]

The objection is overruled.

Will you read the question, Mr. Reporter?

(The reporter read the last question as follows: "Q. Based upon what you know would you estimate what the additional costs are to maintain a girl in grammar school?")

A. Well, I would estimate about half again, maybe.

Q. (By Mr. Murphy): Would you clarify what you mean by "half again"?

A. Well, I estimated a hundred a month, and maybe probably half again that much.

The Court: I think we all understand that phrase. That is sufficient.

Q. (By Mr. Murphy): And does that again include clothing, food, medical and other expenses you enumerated before? A. Yes, sir.

Q. Could you estimate what the expenses would be in addition to those with a base of \$100.00, as you estimated before, could you estimate what the additional cost would be, if any, upon a girl going to high school?

Mr. Koch: I object, your Honor. [358]

I don't understand the question at all.

Mr. Murphy: Strike it. I will rephrase it.

The Court: Ask her if she has an opinion about what it would cost for high school training?

Q. (By Mr. Murphy): Do you have an opinion

(Testimony of Fyrrn Bloth.)

about what it would cost for maintaining a girl in high school?

A. Oh, I'd say—you mean, in comparison with the original hundred?

Q. Well, do you have an opinion on it? You can answer that yes or no. A. Yes.

Q. What would that opinion be, in addition to the one hundred dollars we talked about before?

A. Well, based on my experience with my girl, I'd say they're about double when they get in high school.

Q. Could you give some particulars upon which you base your estimate for the increase in high school?

The Court: I do not think I would do that, Mr. Murphy. The Court takes the opinion like any other opinion. I do not think you had better go into that. It is a little bit too contingent.

Q. (By Mr. Murphy): Did you personally [359] know Mrs. John Waldrop? A. Certainly.

Q. Did she attend school?

A. Yes, she went to——

Mr. Koch: I object, your Honor, to the educational background of Mrs. Waldrop. I can't see its materiality.

The Court: Mr.?

Mr. Murphy: Mrs.

The Court: I am not so sure but what that would have some bearing on her right to support, and the kind of support that she would be entitled to dur-

(Testimony of Fyrn Bloth.)

ing the time of her life after his death, so the objection is overruled.

A. Yes, she attended Texas Western College in El Paso.

The Court: The Court has already understood that there is before the Court that she was a person not of sound body but that she was an ill person, and that she had heart trouble.

Mr. Murphy: Thank you, your Honor.

The Court: Do Counsel understand, as the Court does, that that much of the evidence is before the Court? That much of the evidence is before the Court, as I understand it.

It was the particularities of hospital bills [360] and things like that that the Court declined to go into on objection; is that it?

Mr. Koch: I thought that that question about her health the Court sustained an objection to. I was just checking my notes to——

The Court: What the Court meant to sustain was the tendency, which I thought was showing up, to go into particular expenses like hospital bills, and so on.

If that is not in the record, Counsel may have that in mind, the part that I spoke of as having an impression was in the record.

What was her general state of health, the wife of Mr. Waldrop, your sister, Mrs. Faye Waldrop?

A. She was a semi-invalid.

The Court: And what type of illness did you know of that she had?

(Testimony of Fyrn Bloth.)

A. She had a rheumatic heart.

The Court: Do you know how long she had had that heart condition?

A. She had had it that we know of since about 1949.

The Court: Do you know of any other condition in her health that is substantial enough to [361] justify your mentioning it?

A. No.

The Court: What was the decedent's attitude, if you know his attitude, towards providing proper support for your sister as his wife?

A. Well, he was very much in love with Faye, and they wanted a family even though they knew it would be at the risk of her health, and he was very proud of the fact that he was going to——

The Court: Yes, but what I want to know is what kind of support did he provide for her?

A. Well, he provided her with the support that he could from his pay. I mean——

The Court: Of course I don't know what that was, you see. I do not know that. I am not acquainted with that.

A. Yes.

The Court: What kind of pay did he get, and what kind of work did he do, if any, before he married your sister?

A. He was in the Army when he married my sister, and he made her an allotment.

The Court: How much was that, do you [362] know?

(Testimony of Fyrn Bloth.)

A. I believe it was around seventy-some-odd dollars a month, was the allotment.

The Court: How long did she enjoy that, if you know?

A. Until the time of his death.

The Court: Do you think of any other type of support or any other high spot in the character or nature of the support he gave your sister as her husband? If so, will you state what it was.

A. I don't believe I understand.

The Court: It is a question not of how much he loved your sister, or how much she loved him, but it is a question of how much money she lost on account of his death.

A. Well, she——

The Court: And that is measured in large part on his support of her, and that depends in part upon the type of support.

What kind of support did he provide for her?

A. Well, he was her sole support. In addition to the allotment, why, he sent money to her. She——well, he was her sole support, period. [363]

The Court: Do you know how much pay he got in the last year or so of his service?

A. Well, he was a Sergeant First Class, and I believe their base pay is about \$234.00 a month.

The Court: Do you know how much of that salary of that size he allotted to his wife?

A. The standard allotment is around \$70.00. I don't know the exact figures, but——

(Testimony of Fyrn Bloth.)

The Court: Are you saying that to your knowledge he sent money to her besides that?

A. Yes, sir.

The Court: During the time of their married life, was there any part of it when he was not in the service and away from home?

A. He was in the service the entire time, but he was at home a short time after they were married before he was sent over to Korea.

The Court: How long, about, were they married?

A. Well, they were married not quite a year.

The Court: During that time did he ever provide her with a house or a home of their own, [364] either through personal ownership of the property or his renting property for her?

A. Yes, they rented right after they were married until the time that he was sent off. He was sent off to school shortly after they were married.

The Court: What school?

A. To an Army school.

The Court: How much education did he have? What was the extent of his schooling?

A. Well, according to records, he didn't finish high school.

The Court: How old was he when he died, if you know?

A. Twenty-four years old.

The Court: How old was you sister when she died, if you know?

A. She was twenty-six.

(Testimony of Fyrn Bloth.)

The Court: She was about a year older than he was when they were married?

A. Yes, sir.

The Court: You may inquire about any other thing in particular that will bear upon the pecuniary benefit that she would have realized had his life been continued. [365]

Q. (By Mr. Murphy): Where did Mrs. Wal-drop live before he died?

A. She lived in Canutillo, Texas.

The Court: Where?

A. Canutillo, Texas.

Q. (By Mr. Murphy): Where did she live after he died?

Mr. Koch: I don't see the materiality of where she lived after he died.

The Court: The Court will overrule that objection.

A. Well, she lived at the same place. I mean, she continued to live there at Canutillo.

Q. (By Mr. Murphy): In what type of a place?

A. They had a small apartment in the home of a friend.

Q. Did she ever work, his wife?

A. She worked prior to the rheumatic heart.

Q. Did you know Sergeant Waldrop before he died?

A. Yes, I did.

The Court: What sort of habits of life normally did he seem to you to have or did you find that he had?

A. Well, I found him to be a very fine, up-

(Testimony of Fyrn Bloth.)

standing person. He was sort of a young, carefree boy until he and Faye married. He seemed to settle down considerably, and he took his [366] marriage very seriously.

Of course, he was just a kid, but he was a big, fine-looking——

The Court: How tall was he?

A. Oh, he was six foot or over.

The Court: What do you know of his health?

A. Oh, he was just as healthy as—real healthy, big, full of energy, full of life.

The Court: State what you know of his inclination to work or not to work, or to be provident, or the reverse of provident. State what you know of those things, if anything you do know.

A. Well, from his conversation I think he took his Army——

Mr. Koch: I object, your Honor, to——

The Court: It is more or less of what you observed of the way he lived and his reactions to his surroundings, I think.

A. Well, I think he took his service in the Army seriously. He felt an obligation toward it, and he definitely wanted promotions—well, I just thought he was a fine person.

The Court: Where was he reared?

A. In Jasper, Alabama. [367]

The Court: Was he married to your sister while stationed in the military service at Fort Bliss?

A. Fort Bliss, yes, sir.

The Court: Near El Paso?

(Testimony of Fyrn Bloth.)

A. Yes, sir.

The Court: You may inquire.

The Witness: I have a picture of Faye and John if you'd be interested in seeing it.

Mr. Murphy: Yes, your Honor, I was just ready to ask that this be identified.

The Court: Let it be marked for identification.

The Clerk: It will be marked Plaintiffs' Exhibit Number 20.

(A photograph was marked Plaintiffs' Exhibit Number 20 for identification.)

Q. (By Mr. Murphy): Can you identify that?

The Court: You do not have much information after you get the answer to that.

Why don't you at this stage form the habit of asking her, "Do you recognize that picture," and then——

Q. (By Mr. Murphy): Do you recognize what you have in your hand, that picture? [368]

A. It's a picture of my sister Faye and her husband, John Waldrop.

Mr. Murphy: Plaintiff offers Exhibit Number 20 in evidence, if the Court please.

Mr. Koch: I object to it, your Honor.

The Court: The objection is overruled.

Mr. Koch: It hasn't been identified at all, your Honor, except as to who the people are.

The Court: The objection is overruled. It is admitted as bearing upon the married life of the decedent husband and wife, the decedent husband

(Testimony of Fyrn Bloth.)

being the decedent whose estate is one of the parties plaintiff in this action.

(Plaintiffs' Exhibit Number 20 for identification was admitted in evidence.)

Q. (By Mr. Murphy): Do you know when that picture was taken?

A. It was taken shortly after they were married.

Q. Did Mrs. Waldrop ever work, or do you know if she ever worked?

A. Yes, she did. She worked prior to the last attack of rheumatic fever, which damaged her heart permanently.

Q. Do you know if she worked while they were married?

A. No, she never worked while they were married. [369]

The Court: What type of occupation did she follow?

A. She was a clerk with the Standard Oil Company in El Paso, Texas.

Mr. Koch: I can't hear, your Honor.

The Court: Read the answer, Mr. Reporter.

(The reporter read back the last answer.)

Q. (By Mr. Murphy): Do you know whether his wife relied upon Sergeant Waldrop entirely for her support? A. She did.

Mr. Koch: I object to the form of the question, your Honor.

The Court: It is objectionable, but I believe we will just—it is a matter of form. The objection is over—although it is objectionable, the Court feels

(Testimony of Fyrn Bloth.)

it is more trouble to rephrase it in another form than the way it is, so the objection will be overruled.

Q. (By Mr. Murphy): Do you know if Sergeant Waldrop knew that his wife was going to have a child? A. Yes, definitely.

Q. Do you know what his attitude was toward the expectant child's birth? [370]

Mr. Koch: I object to that.

The Court: It seems to me she has already commented on that in her testimony.

Mr. Murphy: Oh. If she has, your Honor, I didn't hear that.

The Court: He took that circumstance seriously, did you not previously——

A. Very, yes.

The Court: You mentioned that previously, did you not?

A. I said that he took his marriage very seriously, but he wanted a child very badly.

The Court: I understood you to——

Mr. Koch: I move that the answer be stricken, your Honor.

The Court: The answer is stricken for the reason that she has already gone into that when she said that notwithstanding the deceased wife's health, known to her husband, both the deceased wife and the deceased husband were very anxious to have a family.

That is the reason the Court sustains the objection. It has already been gone into.

(Testimony of Fyrn Bloth.)

Q. (By Mr. Murphy): Have you observed anything that would indicate special talent for Judy Ann? [371]

Mr. Koch: I object to the form of the question, your Honor.

The Court: I think I know what he means, but I wish you would change the form of the question to ask more directly, to state what, if she knows, what if any special talent Judy Ann manifests at this time.

Is that not what you mean?

Mr. Murphy: Yes, your Honor.

The Court: Strike the question suggested by the Court and you may now frame a proper question on that subject.

Q. (By Mr. Murphy): What, if any, special talent does Judy Ann have?

Mr. Koch: If she knows of her having any.

The Court: If she knows of her having any.

Q. (By Mr. Murphy): If you know of her having any.

A. Well, I think she has a definite musical talent.

The Court: Do you know of any other? If so, state it.

A. Well, I plan on giving her both music and dancing lessons.

The Court: Is that because of any aptitude [372] you think she possesses, or is it just because you want to do it whether she has the aptitude or not?

(Testimony of Fyryn Bloth.)

A. I think she has the aptitude. I'd like to see if I could develop it.

The Court: You may proceed.

Q. (By Mr. Murphy): Do you have any opinion as to whether or not she has college aptitude?

Mr. Koch: I object to the question, your Honor. The opinion of this witness isn't competent with this type of question. She's not an expert in the field, and hasn't been so qualified.

The Court: I think that objection should be sustained. It is sustained.

Q. (By Mr. Murphy): Do you intend to send her to college when she reaches the proper age?

A. Definitely.

Mr. Koch: I object to that, too, your Honor. There's no testimony that's in the record except that this lady is making a home for the child now.

The Court: The objection is sustained. I can imagine some proper forms of question that could be asked about the child's qualifications, if any, as manifested at this time for a possible future [373] college career or something like that.

I wish to have a recess.

(Short recess.)

The Court: Will the witness please resume the stand?

(Fyryn Bloth resumed the stand.)

The Court: You may resume the interrogation. Be as brief as possible, Mr. Murphy.

Mr. Murphy: Thank you, your Honor.

(Testimony of Fyrr Bloth.)

The Court: I think you have fairly well covered the ground.

Mr. Murphy: Thank you, your Honor.

Direct Examination—(Continued)

Q. (By Mr. Murphy): Have you observed Judy playing with other children at any time?

A. Yes, sir.

Q. Have you observed her with the other children at kindergarten? A. Yes, I have.

Q. Do you have an opinion as to her mental abilities compared with the other children of her age group?

Mr. Koch: I object, your Honor, to—— [374]

The Court: The objection is overruled. It has some bearing on whether or not she is likely to take schooling.

A. I believe Judy is above average mentally.

Q. (By Mr. Murphy): Do you have the complete care of Judy now? A. I do now, yes, sir.

Q. Do you intend to keep her with you?

A. I certainly do.

Q. Until she reaches 21, or marries, or some other time, or any time?

A. I intend to keep her just as if she were one of my own. She is my own.

Q. When she becomes of age, and when she does will you permit her to go to college?

A. I intend to see that she goes to college.

Q. Do you know the amount of the medical expenses incurred for Judy's birth?

(Testimony of Fyrn Bloth.)

A. It was around \$900.00 at that hospital for Judy's birth, between nine and a thousand dollars.

Q. Were there others?

A. Yes. We took her to another hospital. She came home and then we took her back to another hospital.

Q. Do you know whether or not, if any, there were additional expenses at another hospital? [375]

A. She had a seven hundred hospital bill at the second hospital.

The Court: What was the name of it?

A. Hotel Dieu in El Paso was the second hospital, and Judy Ann was born in Southwestern General.

The Court: Where is that?

A. In El Paso. They are both in El Paso.

The Court: Hotel—what do you mean by that? Was she at a hotel, or is that the name of the hospital?

A. That's the name of the hospital. It's a Catholic hospital in El Paso.

Mr. Murphy: No further questions, your Honor.

The Court: You may inquire.

Cross Examination

Q. (By Mr. Koch): Mrs. Bloth, from the time that Judith Ann was born, did she live with her mother until her mother passed away?

A. Yes, she did.

Q. Where did her mother live? [376]

A. Canutillo, Texas.

(Testimony of Fyrn Bloth.)

Q. Is that some distance from Alamogordo, New Mexico?

A. That is about—well, it's twelve miles from El Paso, and Alamogordo is ninety miles from El Paso.

Q. It's some hundred-odd miles away?

A. Yes.

Q. It's ninety miles from Canutillo to El Paso?

A. No, it's ninety miles from Alamogordo to El Paso, and Canutillo is between El Paso and Alamogordo. It's twelve miles past—

Q. So it's seventy-eight miles, roughly, from Alamogordo? A. Yes.

Q. Did Mrs. Waldrop live in an apartment in Canutillo?

A. She lived in a small apartment in the home of a friend there in Canutillo. She and my mother and Judy.

Q. The three of them lived together there?

A. Yes.

Q. After Mrs. Waldrop passed away, how long did the child remain there with her grandmother?

A. They didn't remain there. They moved to Alamogordo with us immediately. We took them right home with us.

Q. Now, you mentioned that for two years—in other words, that brings us one year up to the end of March, 1953. [377]

Now, did I understand you to testify that for two years the child lived with the grandparents?

A. She lived there with us in our home for a

(Testimony of Fyrn Bloth.)

year. My mother and my dad and Judy lived there with us, and then we bought another home and left them in our old home.

Q. The grandparents—the whole family was together from 1953 to early 1954?

A. That's right.

Q. Then you and your husband and your children moved out, leaving the grandparents and Judy in the house you formerly occupied for a two-year period; is that correct?

A. Two blocks from the house we bought.

Q. That was from 1954 to 1956?

A. That's right.

Q. How long has Judy been with you in 1956? When did she make her home with you again?

A. We sold the first home and built on to our present home and brought them over in October of '56.

Q. So they've been with you since last October?

A. In the present home, yes.

Q. Now, are your estimates on the cost of maintaining Judy based upon the cost of maintaining your five-year [378] old child or on the cost of maintaining Judy since she's been with you since last October?

A. Well, they are on—we maintained my folks and Judy in the other home.

Q. You paid the costs of maintaining that family? A. That's right.

Q. How much did you pay to your parents for

(Testimony of Fyrn Bloth.)

the cost of their maintenance and the child's maintenance?

A. Well, I didn't pay them anything. I just paid the bills.

Q. Well, how much did the bills amount to each month on the average?

A. Well, do you want the utility bills, the rent, and everything?

Q. I want the combined total.

A. Yes. Well, we paid \$63.00 a month payment on the house.

Q. Just a moment. I want to make a note of this. Sixty-three dollars for what?

A. Payment on the house.

Q. Yes.

A. And our utility bills usually ran around \$40.00 because we had—electricity is very high in Alamogordo.

Q. Yes. [379]

A. And then—I don't know, I didn't keep any record of the food or anything, but I'd say it averaged about between twenty-five and thirty dollars a week.

Q. That would be another \$130.00 a month, roughly?

A. Well, one hundred twenty, one hundred thirty dollars a month. And we had taxes.

Q. How much were they?

A. Our taxes were, oh, I'd say about \$60.00 a year, property taxes, county taxes.

Q. Yes.

(Testimony of Fyrr Bloth.)

A. We had sewer assessments, we had paving assessments.

Q. How much were those a year?

A. Well, I'll have to—we paid them quarterly, and I think the paving assessment was about \$60 per quarter; the sewer was much less, it was about \$14 a quarter, I believe.

Q. Were there any other expenses?

A. Well, you have the usual maintenance expenses, improvement expenses.

Q. What do you mean, improvement?

A. Well, we enclosed the entire place by fence so the children could play.

Q. Do you consider that one of the costs of—regular monthly costs?

A. You asked me the costs of the—— [380]

Q. Well, how much was the fence?

A. Well, the fence cost between a hundred and two hundred dollars. My husband did the work.

The Court: What is his usual occupation?

A. He's Sales Manager for the Coca Cola Company in Alamogordo.

Mr. Koch: I couldn't hear the answer.

The Court: Sales Manager for the Coca Cola Company in Alamogordo.

Is he a native New Mexican, or——

A. No, sir; he was born in Delaware.

Q. (By Mr. Koch): Will you continue with any other expenses that you can recall?

A. Well, he put in walks, filled in the yard and

(Testimony of Fyrn Bloth.)

put in walks, kept the house painted. We laid down flooring, and——

Q. Did that have any direct bearing on the cost of maintaining Judy, or was that a matter of maintaining the property?

A. Well, it was providing her a home and a proper home, we thought.

Q. How about clothing?

A. Well, I couldn't itemize it or anything. I have accounts with department stores in El Paso, and I [381] just buy the family needs down there. I never broke it down or itemized it.

Q. Well, my figures bring us up to somewhere in the neighborhood of \$280 per month; and I don't know whether you have included—that doesn't include anything for the child's clothing.

Did she have kindergarten or nursery school care at that time?

A. No, not at that time.

Q. Would it be appropriate in your opinion to divide this figure by four to determine—or, by the number of people that were living in that house at that time to determine the cost for each one?

A. No, I don't think so, because I think children cost more than older people. I think they eat more; I think they require more.

Q. Judy, you think, ate more than the grandparents? A. I do, yes.

Q. It cost more to maintain her?

A. I do.

Q. Well, I note here that of these items, many

(Testimony of Fyrn Bloth.)

of them, in fact, all except the food, relate to the house payments, utility payments, tax payments, assessments for sewers and paving, fence and other walks and improvements to the house. [382]

Now, of those items the only one that would not apply equally to Judy, as I see it, from your testimony, would be the food. Is that correct?

A. Well, the idea is that my folks probably wouldn't even have lived there if it hadn't been for Judy. I mean, we did that specifically and solely to provide Judy a home and not——

Q. So you think a larger percentage allotment should be for Judy, because otherwise these expenses wouldn't have been incurred; is that what you mean?

A. It wasn't necessary to maintain a three-bedroom home for my parents.

Q. Well, was it necessary to maintain a three-bedroom home for this child?

A. For my parents and the child, it was.

Q. Do your parents have any other income except that which you and your husband provide them?

A. They have a very small income, I'd say about \$400 apiece each year.

Q. \$800.00 a year was their combined income?

A. That's right.

Q. Was that from Social Security or pension income, do you know?

A. No, that was from a little bit of property [383] they have out in Blythe, California.

(Testimony of Fyrn Bloth.)

Q. Now, will you set forth the same expenses since October, 1956, incurred in the home that you and your husband and children and Judy occupy?

A. Well, we added on to our home to provide room for my parents and for Judy, and——

Q. Well, for this purpose I would appreciate it if you would simply list the living expenses. I include in that payments made on the house as a rental or in purchasing the house, but not capital improvements for building on rooms, and that sort of thing.

A. Well, we built on for the purpose of accommodating them.

Q. I understand that, but I am asking you to exclude that expenditure; simply the monthly payments made on the purchase of that home, and not in payment for the improvement of increasing the size of the house.

A. Do you want the expenses like I listed before?

Q. Yes; food, utilities, clothing, medical care, and that sort of thing.

A. I'd say our grocery bill runs around \$50 a week now. Our utilities, the minimum is \$75 a month. Do you want the house payment?

Q. Yes; how much is that?

A. \$110.98 a month. [384]

Q. Yes.

A. I've forgotten what I listed before. It's kind of a hard thing to do, sit here and——

Q. Clothing, medical expenses, dental care——

(Testimony of Fyrn Bloth.)

A. Well, the medical expenses, do you want for the whole family?

Q. Yes.

A. Oh, they run around \$25 a month, I'd say, and the clothing I would say about \$60 a month. What else?

Q. How about the cost of your daughters that are in school, and so on? A. Well,—

Q. Do they attend a private school?

A. No, they go to public school.

Q. Are the public schools free?

A. Well, I don't know whether you'd call them free or not. They—

Q. Do you pay a tuition to send the children there?

A. You don't pay a tuition, no. You pay for your books and your supplies, and so on and so forth.

The Court: Is it a school maintained by taxpayers' money or in some other way?

A. It is a taxpayers'.

The Court: It is not a private school?

A. No. [385]

The Court: Or a parochial school?

A. No, it's a public school.

Q. (By Mr. Koch): Is there an item for medical expense that your family incurs?

A. I don't understand what you mean?

Q. I'm asking you if you or the other members living in your household incur any medical expenses per month or per year?

(Testimony of Fyrn Bloth.)

A. Oh, just like any family, we incur medical expenses, certainly.

Q. I'm trying to estimate them.

A. Well, I don't know how you would estimate something like that. I told you about \$25 a month would be what I consider a conservative estimate.

Q. For medical and dental?

A. Not necessarily dental; medical.

Q. How about dental?

A. Well, I have dental expenses. My oldest daughter has had quite a bit of trouble with her teeth, and I have dental appointments waiting when I get back.

Q. Well, I have added up the expenses here, and they come to \$496 per month, and I'm just trying to find out if that's a reasonable figure, or if there are items that should be added in that I have not added in. [386]

A. Well, you have listed the essentials, of course, but then you can't just go by essentials. I have a daughter in high school, and she belongs to Rainbow, and she's a cheer leader, and she belongs to church organizations, and she's a pretty expensive item right there.

Q. Well, how much do Rainbow and church expenses and other activities of your daughter come to?

A. Well, I've never sat down and added them up. I couldn't—

Q. Well, would it be, say, a matter of ten or fifteen dollars a month?

(Testimony of Fyrn Bloth.)

A. Well, I wouldn't say that, not when you figure your formals, and she averages about three formals a winter, I would say, and maybe——

Q. How old is this daughter?

A. She'll be sixteen in July. She takes music. She has piano recitals and so on and so forth.

Q. What do the music lessons cost?

A. They cost two dollars a lesson, and she has two lessons a week.

The Court: How much a lesson, did you say?

A. Two dollars a lesson.

Q. (By Mr. Koch): Three formals a year [387] for a fifteen-year-old daughter?

A. At least that.

Q. Maybe more. Now, how old is your younger daughter? A. She will be five in June.

Q. Does she take any music lessons or dancing lessons?

A. Not yet. They start them at six.

Q. Now, is she cared for at the same kindergarten that Judith Ann goes to?

A. When my mother isn't able to care for her, she is.

Q. Now, how much of the time since October of 1956, when the child and the grandparents came to live with you, has Judith Ann and your younger daughter attended kindergarten?

A. How many times?

Q. How much of the time, how much of the period from October of 1956 when Judith Ann began to live with you again?

(Testimony of Fyrn Bloth.)

A. Oh, they've been there between three and four months I'd say.

Q. Three to four months?

A. No, let me see: October—well, my mother just had major surgery, and she hasn't been able to care for them very much since she's been over there. That's one reason we moved them over. My dad, he is ill, and my mother is ill. [388]

Q. Neither of them work? A. No.

Q. So it's a question of when they feel strong enough to have the children around during the day time? A. That's right, yes.

Q. Now, what is the nature of your employment, Mrs. Bloth?

A. I'm secretary at Frank P. Llewellyn, Incorporated, in Alamogordo, New Mexico.

Q. What is your monthly income?

A. I make \$98.00 a week.

Q. Do they withhold taxes from your check?

A. Yes.

Q. What is your net check?

A. \$82.59 a week.

Q. And what is your husband's income?

A. It varies according to commission sales.

Q. Well,——

A. His base pay, I believe, is \$110 a week.

Q. Well, what was his income for 1956?

A. It was something close to \$7,000.

Q. What is Judith Ann's income, if any?

Mr. Riley: I object to that. I don't think Judith

(Testimony of Fyrr Bloth.)

Ann's income, if any, has anything to do with the measure of damages, and it's entirely [389] irrelevant.

We are pretty well briefed on that question, and I think it cannot be used to diminish the benefits accruing to her, or that would have accrued to her from her father in any way, and that such testimony should be excluded from the record.

Mr. Koch: Your Honor, as I understood Mr. Riley's statement at the beginning, it was hoped that the examination of this witness could be concluded today.

I don't care whether it's a matter of cross-examination or whether it's considered an appropriate question on independent examination that I would conduct as counsel for the defendant.

The Court: You may call her as a defendant's witness if you wish, but the Court has to rule now, unless you withdraw the question, on whether you may propound it.

Mr. Koch: Well, I would like the Court to rule, but before doing so, I would like to bring to the Court's attention the relevancy of the question.

We are concerned here with not only the—the measure of damages is not the only issue. [390]

One of the questions here the Court expressed an interest in before the afternoon recess is the financial support and effort——

The Court: The financial loss sustained by the wife during the time of her life following the death and the financial loss to this child.

(Testimony of Fyrm Bloth.)

Mr. Koch: Yes. And therefore the Court inquired with respect to what arrangements the husband had made for his wife's support by allotment or by other allowance from his pay, and this will bear upon what those efforts of the husband were, just what estate he left for this child, and from that standpoint——

The Court: The estate is something that the death caused to exist. That is not a right which the child has to have recovery for the wrongful death.

Mr. Koch: No, it does not go to the question of the recovery for the wrongful death, but it goes to the question of the effort the husband made to provide for his family during his lifetime.

Mr. Riley: I can't see how.

The Court: Have you any case [391] controlling that point?

Mr. Koch: I do not, Your Honor.

The Court: Do you have any case controlling? You seem to have examined it.

Mr. Riley: Yes, I have, your Honor.

First of all, as to the relevancy, I can't see how Mr. Koch's statement could be true when he states that what income Judy might have would affect the husband's provisions for the family.

Now, the benefits from insurance to a survivor of a decedent are held to be inadmissible as diminishing—that is, to show a diminishing of the damages or to limit damages to be recovered in the following cases:

(Testimony of Fyrn Bloth.)

In Kress versus Sunset Motors.

The Court: What Court——

Mr. Riley: It's 123 Washington 604.

The Court: And what did that hold?

Mr. Riley: It held that the defendant could not introduce evidence of insurance benefits or pensions accruing to a survivor of a decedent for the purpose of diminishing the amount of the recovery, or diminishing the amount—to show a diminishment of the amount of loss sustained by the surviving heir. [392]

Mr. Koch: I don't offer it for that purpose, Your Honor.

I offer it to show the effort that the husband made to provide for his family during his lifetime, and therefore the amount that might be reasonably expected to have been available for this child's support had the husband not died.

I haven't inquired about insurance. I have only asked about income. Insurance itself is not income, and I am not concerned about the principle, but I am——

The Court: Wasn't it income that you seek to show dependent upon the occurring of his death?

Mr. Koch: I don't know if it was or not.

The Court: It was not payable without death, was it?

Mr. Koch: I don't know about that. I'm not concerned solely with insurance proceeds or income from it; I'm concerned with savings or other accumulations that may have existed apart from death.

(Testimony of Fyrn Bloth.)

The Court: Did you include in this question, or did you, and did you intend to include [393] in this question what he paid the child—no, because the child was not living. It has to be so because it is dependent upon his death if the child has received any provision from him.

Mr. Koch: The child was not even living, Your Honor, but——

The Court: Therefore he could no have possibly established any precedent of conduct towards the child.

Mr. Koch: No, but it might have been with respect to his wife, perhaps.

I assume that the child succeeded to whatever estate the deceased left to his wife upon her death.

The Court: It seems to me that everything in the question you seek concerns a right to the child occurred only because he died, not because he lived, and received it from him or his estate because he died by, she claims, what was wrongfully caused by the defendant.

She is entitled to the loss, the pecuniary loss of his continuing life, if that is not in any way lessened or increased by whatever provisions that he may have had for her upon his death, or any provisions that the Court may have [394] made out of any estate he may have left for the child.

Mr. Koch: I don't——

The Court: It does not affect his ability or his desire to pay, it seems to me, for the support of his child.

(Testimony of Fyrn Bloth.)

Mr. Koch: It's only for that purpose I offer it. I'm not trying to——

The Court: I do not think it can possibly have any bearing on that, and the Court rules sustaining the objection. I distinguish—well, there is no need of distinction because the facts are not here. If this effort to show this relief this child is receiving from the estate of her father had something in it, not that kind of relief, but the support that her father paid for her benefit before his death to the extent that it was paid before his death might be shown, but I do not understand that there is anything of that sort here.

Mr. Koch: I will rephrase my question, Your Honor. Maybe I can circumvent that difficulty.

Q. (By Mr. Koch): Mrs. Bloth, will you state what estate Mr. Waldrop left upon his death, exclusive of any insurance proceeds? [395]

A. Well, just his——

Mr. Riley: I am going to object to the question for the very same reason. I don't care if he had a million dollars to which this child was an heir, or if he had a hundred dollars, or if he had absolutely nothing. It would not have any bearing whatsoever upon the measure of damages as far as this child is concerned.

The measure is solely the loss of income, and the other attributes of her parental control insofar as they are compensable by money, and whether or not he had an estate or not has nothing to do with the question of damages, or, as far as I can see, because

(Testimony of Fyrn Bloth.)

of the age of the decedent, the fact that they had been married a very short period of time, I can't see how it could affect or show anything that counsel asserts that it would.

Mr. Koch: Here, Your Honor, I am not attempting to bring the fact of his death into it, but only to show what the fruits of his labor had been to the benefit of his family, how he had used the income that he made during his lifetime, or at least since his marriage, in a way that inured to the benefit of his family upon *his* [396]

The Court: Read the question now before the witness, Mr. Reporter.

(The reporter read the last question as follows: "Q. Mrs. Bloth, will you state what estate Mr. Waldrop left upon his death, exclusive of any insurance proceeds?")

The Court: That is equivalent of asking did he make any savings, did he effect any savings during his lifetime.

Is that what you mean to ask?

Mr. Koch: Yes, Your Honor.

The Court: Construed in that way, the objection to it is overruled, and you may ask her about any savings he may have made by proper frame of question. A. Well, I—

The Court: Just a minute.

The Witness: Excuse me.

The Court: Frame a question about savings.

Q. (By Mr. Koch): Mrs. Bloth, what savings did Mr. Waldrop accumulate during his lifetime?

(Testimony of Fyrr Bloth.)

A. Well, I wouldn't have any way of knowing. I mean, it was between he and my sister. I [397] wouldn't know what——

Q. Do you know of any?

A. Actually, I don't know. I mean, I didn't have anything to do with their business affairs, so I wouldn't know.

Q. Did the Army send to your sister any money representing bonds or other deposits which he made through the allotment system in the Army?

Again, I am not talking about insurance.

A. Again, I wouldn't know.

Q. Now, as I recall the evidence, your sister and Sergeant Waldrop were married in March of 1951—of 1950; is that correct? A. 1951.

Q. Of 1951? A. That's right.

Q. Shortly prior to their marriage your sister was not employed, as I understand it?

A. That's right.

Q. Ever since she had had the last rheumatic heart attack? A. That's right.

Q. In 1949? A. That's right.

Q. And how was she supported? [398]

A. By the family.

Q. How long had your sister suffered from this heart condition prior to that attack in '49?

A. Well, we didn't know that she had. She evidently had had a prior case of rheumatic fever, but we weren't aware of it. The doctor didn't diagnose it as such.

(Testimony of Fyrr Bloth.)

Q. You later found out that when she had the difficulty in 1949—was it then that you found out that she had had it for some time without it having been detected? A. That's right.

The Court: In what part of the country did she grow up as a youth, in her childhood.

A. Alamogordo.

The Court: And that's where your family lived?

A. Yes, that's right.

The Court: Is that where you got your education? A. Yes, sir.

Q. (By Mr. Koch): Will you tell me what you base the estimated increase of maintaining Judy from \$100 to \$150 a month when she enters grade school, what [399] it is predicated upon?

A. Just an estimate, the difference in clothes and the difference in the wear on clothes, their school expenses; I mean their lunches, their transportation.

Q. Don't the children take their lunches to school?

A. I don't know about other children.

Q. How far is the school from your home?

A. Oh, I'd say it's about ten, fifteen blocks.

Q. What sort of transportation is available?

A. Well, we'll have to take them. There is no transportation. I mean, no provided transportation.

Q. Are there buses or street cars or anything like that that the children take?

A. No. Alamogordo is only 15,000 population. We have no buses, no street cars.

(Testimony of Fyrr Bloth.)

Q. The children don't walk to school?

The Court: Neither buses nor street cars?

A. No, sir.

The Court: Did it ever have any public transportation system? A. Not that I know of.

The Court: Is the growth of the city of recent years or has it always been a city [400] that has enjoyed substantially a steady growth?

A. Oh, it's known as a boom town in New Mexico.

The Court: Due to what activity, if any?

A. The Holloman Air Force Base, guided missile experimentation.

The Court: Has it had more or less of its increase in population by reason of that installation?

A. Yes, sir. That is the reason for the increase.

The Court: You may inquire.

Q. (By Mr. Koch): How many people live in Alamogordo?

A. Well, they estimate between twelve and fifteen thousand right now.

The Court: In what direction from El Paso is it? A. It's north.

The Court: Directly, more or less?

A. More or less directly, yes.

The Court: You may inquire.

Q. (By Mr. Koch): In estimating that it would cost \$200 a month to maintain a child in high school, and as I understand it, you have a daughter in high school now, and referring particularly to [401] the

(Testimony of Fyrr Bloth.)

household expenses that you presently incur, will you explain to me, except for the school activities such as Rainbow Girls and formal clothes, what that increase is based upon?

A. Well, you have to have more when you go to high school. There's—

Q. I beg your pardon?

A. There are more expenses incurred in high school. You have, oh, your lab material, you have your extra books.

Q. How much is the lab material?

A. I don't have any figures with me. As I say, all of mine are estimates.

Q. But you've estimated \$50 a month, and I'm sure that the lab material might be three or four dollars in a semester; so it's hard for me to understand how this large differential can be justified, and I want you to explain it to the Court.

A. Well, I'll do my very best.

As I say, my daughter belongs to several organizations in school. She is a cheer leader; we have costumes, we have—there's football, basketball trips.

Q. What do you mean—is she on the basketball team? A. She's a cheer leader. [402]

Q. She's a cheer leader. Where are the games played, at what distances?

A. Well, the distances are rather great in New Mexico. They play Las Cruces, which is a distance of about eighty miles; they play at Carlsbad, they play even as far up as Albuquerque, which is almost 400 miles.

(Testimony of Fyrn Bloth.)

Q. What's the cost of being a cheer leader?

A. Well, I wish you had some of them. There's costumes; they have to——

Q. You wish what? A. Pardon?

Q. You wish what?

A. I wish that you had incurred some of the expenses, then you'd know. There are costumes, the trips.

Q. How much are the costumes?

A. Well, they have two costumes, and by the time you buy the material and have them made, I'd say they cost about \$25.00 apiece.

Q. \$50.00 for cheer leader costumes?

A. That's right, because there's not only the jumper, there's the different blouses that they have to wear with them; there's special shoes they have to wear with them; there's all that sort of stuff.

Q. Does Judith Ann show aptitude for becoming a cheer leader?

A. Both my children imitate my older girl. They are both pretty good cheer leaders.

Her sweater alone, her cheer leader sweater alone cost \$35.00.

Q. Does she just wear it for cheer leading?

A. For cheer leading, and then she has a Pep Squad sweater. She's also on Pep Squad.

Q. Well, the expenses of being a cheer leader are not minor? A. They are not minor.

Q. Are there other such expenses of going to high school that you think the Court should be advised of?

(Testimony of Fyrr Bloth.)

A. Well, there's constant transportation. I mean, I probably spend—use as much gas taking her to and from places as I do going to and from work, and she belongs to the Dramatic Club; she belongs to the Future Teachers organization; and let me see, what else does she——

Q. How far is the school from your home, the high school?

A. Oh, it's about six blocks, but children don't walk anywhere any more. They ride.

Q. You drive them six blocks to school?

A. That's right. [404]

Their activities are at night, and I don't like for them to be out on the street at night.

Q. Will some of these transportation expenses be reduced by reason of the fact that the children will be going to the same school?

A. Well, the transportation will, but the other expenses will be doubled.

Q. Except for the trip to Mexico City, where the child was treated for—to Oklahoma City, excuse me—where the child was treated for the asthma and the allergy, where it was diagnosed, will you tell me what other treatment Judith Ann has had in the last year for her asthmatic condition?

A. She had two shots a week up at the Medical Center.

Q. Up to when—when did that terminate?

A. Well, I don't know the exact date. It's been several months ago.

(Testimony of Fyrn Bloth.)

Q. And since that time?

A. She doesn't have to have shots any more.

Q. Does she have any treatment now?

A. She has medication.

Q. Of what sort?

A. Well, I don't know the nature of the prescription.

Q. What is it, a pill? [405] A. Yes.

Q. How often does she take it? When she has an attack?

A. She takes it when she has a cold or when we see any inclination.

Q. When the pollens are fresh or it looks like she may be starting to cough a little?

A. Yes.

Q. My older child has it, so I'm a little more acquainted with this than cheer leading.

A. You should get acquainted with cheer leading.

Q. Does the child take franal pills?

A. Take what?

Q. Does the child take franal tablets?

A. I really couldn't tell you. I don't know what those are.

Q. Is that the only treatment Judith has now for that condition?

A. The regular treatment, yes. She's very susceptible to colds. She has numerous colds, and as I said, I took her to the doctor Monday before we came up here, and he says she has to have a tonsillectomy.

(Testimony of Fyrn Bloth.)

Q. That's thought it will reduce the incidence of catching cold? A. We hope so. [406]

The Court: Does the doctor prescribe considerably more internal consumption of foods containing iron?

A. She has vitamins, certain kinds of vitamins, regularly, and she has to be on this diet where we avoid all of her allergies, chocolate or corn or pork or anything of that nature.

The Court: When they take cold sometimes they might be affected by low blood counts as affected by lack of iron, so they say.

A. Yes. The doctor says that in some throats more than others the strep germ is present, and my sister, Judy's mother, definitely had this tendency, and evidently Judy Ann does, too.

The Court: You may inquire.

Q. (By Mr. Koch): Mrs. Bloth, I notice from statements from Mr. Waldrop's family that Sergeant Waldrop was in the Marine Corps from 1945 to 1948. Is that correct?

A. I wouldn't know. I didn't know him then.

Q. You knew he was in the Marine Corps, did you not? A. Yes, I understood he was.

Q. Do you know what his rank was in the Marine Corps? A. No, I don't. [407]

Q. Do you know what his income was?

A. No, I don't.

Q. Do you know whether he made any allotment? A. I haven't any idea.

(Testimony of Fyrn Bloth.)

Q. Do you have any information along that line with respect to his service in the Merchant Marine from 1943 to 1945?

A. I don't know a thing about that.

Q. Now, you testified that Mr. Waldrop didn't complete high school, but isn't it a fact that he only went to the ninth grade?

A. Well, that's what I—I didn't know that until I read that interrogatory.

Q. You know it now, do you not?

A. Well, according to that. I didn't know it before.

Q. That was prepared by members of his family, was it not? A. Beg pardon?

Q. That was prepared by his father, was it not?

A. As far as I know. I don't—I mean, I didn't prepare it.

Mr. Koch: May I have the certified copy of the Service record of Sergeant Waldrop, that envelope with the blue cover?

The Court: I do not remember that. [408]

Mr. Koch: It's not in evidence, your Honor. It's like that document we had for Mr. Maynard that the Court required us to put in as——

Mr. Riley: It's attached to the pre-trial order, I believe.

Mr. Koch: No, it's not in the pre-trial order—well, maybe it is.

Mr. Riley: It's referred to in the pre-trial order and identified as an exhibit?

(Testimony of Fyrr Bloth.)

The Court: Here is the pre-trial order. Take this.

Mr. Koch: It's not in the pre-trial order, your Honor.

The Court: Let Counsel see this and see if he sees a reference to it, there.

Mr. Koch: Yes, it's referred to, but it's not attached.

The Court: The Clerk is supposed to have taken the exhibits away so that they can be more handily referred to.

Do you see it, Mr. Clerk, among those taken away from the records?

The Clerk: No, your Honor. There has been only one taken away, your Honor. [409]

Mr. Koch: It's Item 9, your Honor.

The Court: Item 9 referred to in the——

Mr. Koch: It's Paragraph 9 of Exhibit Number 10.

The Court: Exhibit 10. Do you see anything about Exhibit 10 there?

The Clerk: Yes. Certified copy of U. S. Service record.

The Court: If you have it, let him see it.

The Clerk: He has it there, your Honor.

The Court: Go down and point it out to him, please.

(Brief pause.)

The Court: We won't be able to pause any longer. Can you not refer to the information in

(Testimony of Fyrn Bloth.)

some way and speak to Counsel about it? Maybe you can——

Mr. Koch: The original is in the Court file, your Honor. No one else has any. It's the certified copy of the Service record of——

The Court: Mr. Clerk, will you give to Counsel this entire file. That is all the papers that I have. Let Counsel have the entire file. [410]

(The file was handed to Mr. Koch.)

The Court: Mr. Riley, have you any suggestions to offer? Try to assist, if you can.

Mr. Riley: I was going to suggest that it could be that Mr. Koch's co-counsel might have removed that from the file along with the other one of Mr. Maynard's, to have them copied; I don't know. He took one of them, at least, with him. That was filed with——

The Court: That may have been done inadvertently, but whatever that prospect is, it is not here, and you will have to proceed with something else. Maybe you could get the same information and accomplish the same purpose by stipulation. Have you tried it?

Mr. Riley: I'll be happy to try it.

The Court: See if you can. See if you can come to some agreement so that this witness can be accommodated.

Mr. Koch: Your Honor, if I may explain, the difficulty is that this is the certified copy of the Army Military Service record. I don't have a copy of it, and neither does Mr. Riley. They were

(Testimony of Fyrn Bloth.)

sent by the Army in two manila envelopes. [411]

One was given to Mr. Karr because he wanted to reproduce it in the form in which the Court would receive it as an exhibit.

To my knowledge, so far as I knew the other was——

The Court: It is obvious that it cannot be found now. Proceed.

Q. (By Mr. Koch): Mrs. Bloth, you testified that it was your understanding that the allotment that Sergeant Waldrop made to his wife was in the neighborhood of \$70 per month from his Army pay; is that correct?

A. I understand that, but, like I said, I don't know the financial arrangements.

Q. Well, if a certified copy of his Service record set forth the amount of the allotment, would you consider that that figure was correct, and as to the extent that it differed from your estimate, that you were incorrect?

A. Certainly. Mine is just an estimate, just a guess; like I say, I don't know the exact figures.

The Court: Have you a clear recollection of what you saw on that point, as to that allotment?

Mr. Koch: I do not have, your Honor. [412]

The Court: Proceed.

Mr. Koch: Do you?

Mr. Riley: No.

Q. (By Mr. Koch): If that Service record contained medical reports of physical examinations to which Sergeant Waldrop had been subjected——

(Testimony of Fyrn Bloth.)

Mr. Riley: I object to that because that answer must obviously be pure conjecture.

The Court: The Court is going to let a good deal of conjecture in in view of this fact. One possibility is as good as another. It may be in my pocket or your pocket or Mr. Koch's pocket, or Mr. Karr's possession, or anywhere. I do not know where it is. Wherever it is, it is in some place unintended for it at the moment, I am certain of that, and if it has been misplaced, it is through inadvertence, and I ask you to proceed.

Q. (By Mr. Koch): Would you consider that the report of the medical examinations or such medical examinations as should be set forth in Sergeant Waldrop's Service record would reasonably reflect his physical condition at the time of such examination?

A. I know nothing about any medical examination.

Q. But would you consider that the information contained in the military report of his physical examination [413] would be correct? Have you any reason to think it would be incorrect?

A. I have no reason to think it wouldn't. I don't know anything about such an examination. I know nothing about any medical.

Q. You do know that the Army conducts physical examinations and medical examinations of its troops from time to time, do you not?

A. Well, I've read that. I've never been in the

(Testimony of Fyrn Bloth.)

Army; I don't know. I don't know what difference it makes, for Heaven's sake.

The Court: For the purpose of asking questions there is no reason why you cannot use that. You cannot introduce it in evidence.

Mr. Koch: No, your Honor, but if it would be something we would wish to put in evidence, we will comply with the Court's direction of yesterday and have it put in proper form.

The Court: The Court has no objection to that if it is any reminder you wish to use while you are framing questions. Proceed.

Q. (By Mr. Koch): Reading from what is entitled, Enlistment Record, Regular Army——

The Court: Do not do that. Read it to yourself and frame your question, won't you, [414] please, unless Counsel stipulates that you may read the contents of that record into this record.

Is Mr. Riley interested to the extent, I mean, in the expediting of the proceedings, to the extent of seeing if counsel can agree upon what the fact is and let it be stated in the record?

(Mr. Riley and Mr. Koch conferred privately.)

The Court: If Counsel is convinced that such and such a statement is the fact as to an Army record, I do not see any reason why you cannot——

Mr. Riley: Of course, the Army record is certified, your Honor. If they want to prepare a proper copy of it and submit it into evidence, of course I'll have no objection.

(Testimony of Fyrn Bloth.)

The Court: I could not hear you because of the noise on the street.

Mr. Riley: I just wanted to state that the Service record of Sergeant Waldrop is here, and it's certified to be his Service record, and if Counsel wants to put the whole thing in evidence as an exhibit properly prepared in accordance with the Court rules, I couldn't object to it, and I wouldn't.

Mr. Koch: Your Honor, maybe this would be the proper way to expedite it: I would like to question this witness from this record, which is not in a form yet acceptable to the Court, but if that permission is granted, I will undertake to have a black on white prepared in full and submit it for——

The Court: You can ask her if an Army record contains such and such a statement, what her attitude is about the accuracy of it, is all I can see. That might be proper, but I do not wish to say that the record is so and so, and thereby put it into this record in this trial.

Q. (By Mr. Koch): If Mr. Waldrop's Army enlistment record shows a date of enlistment of October 15, 1948, does that correspond with your views on the subject?

A. I don't have any views because I have no knowledge, just hearsay knowledge.

Q. Would you disagree with that date? Do you think that's the wrong date?

A. Well, I don't know why I should disagree with it, because I don't know anything about it.

(Testimony of Fyrn Bloth.)

Q. Would you accept a reference in his military record to the fact that during his prior employment for a [416] period of six months he received a salary of \$37.50 per week?

A. I know nothing about Sergeant Waldrop's wages or Service record except what I've heard.

Q. Do you know when Sergeant Waldrop received his last promotion?

A. No. I'm sorry, sir, but I really don't know about Sergeant Waldrop's Service record or anything. My knowledge of him is purely personal, and through my sister.

Q. Was he a sergeant when he got married?

A. No, I believe he was a corporal. I'm not sure. He didn't use his Army title or rank.

Q. Tell me, what is your own educational background, Mrs. Bloth?

A. I've had two years of college.

Q. And when was that?

A. Oh, a long time ago. Let me see——

Q. Well, I don't think I have to bother you with exact dates.

Have you had any education since that time, formal education?

A. Practical; practical experience.

Q. What musical instruments do you play?

A. I don't play a musical instrument. [417]

Q. Do you sing? A. No, I don't sing.

Q. Do any members of your family play a musical instrument?

(Testimony of Fyrn Bloth.)

A. Yes, sir; my daughter plays the piano and the organ, and sings.

Q. Anyone besides your daughter?

A. No one in the immediate family, no.

Q. Do any of your close friends have substantial musical experience of that type, either as teachers or as proficient students?

A. Well, I have lots of friends who are musically inclined, and my daughter's piano teacher is a close friend of mine. She's an organist, and——

Q. Well, just from your own observation upon what do you base your judgment that Judith Ann has musical talent?

Mr. Murphy: That's objected to, your Honor. She has stated that.

Mr. Koch: This is cross-examination, Counsel.

The Court: The objection is overruled.

A. Well, just from observation. She carries a tune very well for a child her age. Of course, we have—— [418]

Q. (By Mr. Koch): Do you consider that there's some relationship between carrying a tune and playing an instrument?

A. Well, I think if you can carry a tune you usually have a—well, let's say an inclination. I've known children who couldn't carry a tune in a bucket.

Q. I have heard you express your views; I am just trying to find out what special knowledge or training or familiarity you have with the subject as a basis for your view.

(Testimony of Fyrr Bloth.)

The Court: I think you ought to get through, and have in mind that this witness wishes to finish her testimony today, and the Court's time is now limited, as you can see.

I do not wish to have to limit you in your cross-examination, but I think you have pretty well covered the ground, as I think the plaintiffs' counsel did, and I believe that everybody ought to begin considering finishing with this witness.

Mr. Koch: I'll finish in just a moment or two, your Honor.

The Court: Very well. Look over your notes and see if you have not just about covered the field.

Q. (By Mr. Koch): You testified that you believe that Judith Ann has a special talent, and I just want to know on what that is based?

A. Well, whether she has a special talent or not, I intend to see and want to see that she has musical instruction, dancing, all the——

Q. You just want to give her every opportunity?

A. All the opportunities and advantages that I want for my own children I want Judy Ann to have.

Q. Do you feel that as a sort of an obligation to your sister?

A. Well, obligation to my sister and obligation to the child, because I loved my sister and I love the child.

Q. Now, you have also testified that in your

(Testimony of Fyrr Bloth.)

opinion this child has more than average mentality.

Has she had any intelligence tests or anything of that sort?

A. No, it's nothing technical. She's associated with adults the largest part of her life. If you had to cope with her, you'd find out. I think she's above average in intelligence, but I have not given her any intelligence tests or anything, but you can judge a child and tell whether they are intelligent or backward or mediocre or—— [420]

Q. In what situation do you judge her?

A. In what situation?

Q. Yes. Do you judge her in the home?

A. Why, certainly. I have no other—I judge her in all my contacts with her.

Q. Well, that's your basis, your own personal contacts? A. Yes.

Mr. Koch: I have no further questions, your Honor.

Redirect Examination

Q. (By Mr. Murphy): Mrs. Bloth——

The Court: Won't you have in mind, now, Mr. Murphy, that whenever you ask one more question it will give the other Counsel an opportunity to ask two or three more, and be sure that you have to ask something. This lady has been on the stand some time, and she has made a very intelligent and helpful witness in this matter, and I wish you would see if you cannot be satisfied with what she has said and done.

(Testimony of Fyrr Bloth.)

Mr. Murphy: I appreciate that, your Honor, and under the circumstances, I have no further questions. [421]

The Court: Is there anything further, Mr. Koch?

Mr. Koch: No, your Honor.

The Court: You may be excused from the stand, Mrs. Bloth.

The Witness: Thank you.

The Court: And the Court wishes to thank you for the trouble you took upon yourself to come this great distance to appear personally here in Court to try to assist the Court in any proper way in this matter.

The Witness: Thank you for your courtesy.

The Court: I realize that it was some trouble to you, especially in making the very long and inconvenient trip.

The Witness: Thank you for your courtesy.

(Witness excused.)

The Court: Is there anything else?

Mr. Riley: May it please the Court, I would like to ask the Court that the records now on the table before me which have been delivered here by Counsel under the statements which are now a matter of record, be held by the Clerk pending— [422] during the recess.

The Court: That will be done.

I wish you would help the Clerk move them into the proper place.

Mr. Riley: I'll be glad to.

Mr. Koch: Your Honor, I have no objection to

Mr. Riley's request with respect to all this material, but in this material which I made available for our combined use is Part 41 of the Civil Air regulations which we brought; it hasn't come into the case as yet, but it would be of considerable assistance to have this document during the interval, and I would be glad to make it available to Mr. Riley too, but it would be a good deal easier than in Court.

Mr. Riley: As to these documents here today, I have not had an opportunity to examine those, and I take it that Mr. Koch has not either, and we can agree on that, and I would agree to it.

Mr. Koch: I will take this envelope and we will share it during the recess, if that is agreeable.

Mr. Riley: Yes.

The Court: With that exception, then, you will return it when the trial is resumed? [423]

Mr. Koch: Yes, your Honor.

The Court: Do you wish to expressly excuse Mrs. Bloth from further appearing as a witness?

Mr. Riley: Yes, your Honor, I do wish that Mrs. Bloth be excused from further appearance in this case in accordance with my previous indication.

The Court: Is there any objection?

Mr. Koch: No, your Honor.

The Court: Mrs. Bloth, you are excused, and thank you very much. You may return to your home if that is your wish.

Mrs. Bloth: Thank you, sir.

The Court: Those connected with this case are

excused until April 10th, at 10:00 o'clock in the forenoon.

(Thereupon, at 4:30 o'clock, p.m., Thursday, March 28, 1957, a recess herein was taken until 10:00 o'clock, a.m., Wednesday, April 10, 1957.)

11:00 o'clock A. M.

April 9, 1957

The Court: Are parties and counsel ready to proceed with the trial of Gorter vs. Northwest Airlines and of Maynard vs. Northwest Airlines?

Mr. Riley: Plaintiffs are ready, your Honor.

Mr. Koch: The defendant is ready, your Honor.

(Discussion among Court and counsel re length of trial.)

Mr. Riley: At this time, I will move the publication of the testimony by deposition of Mr. Lee Roy Waldrop, which has been filed with the clerk and notice has been given to counsel as required by the rules of the Court.

The Court: Mr. Opsahl is temporarily withdrawn from the stand, and the plaintiffs may now proceed.

(Reading deposition.)

At line 17, page 14:

Mr. Koch: I object to the answer, your Honor, because he doesn't know.

The Court: The objection is overruled.

At line 3, page 15: [426]

Mr. Koch: I again, your Honor, object to his answer.

The Court: The objection is overruled.

At line 5, page 18:

Mr. Koch: I move to strike that answer, your Honor. He acknowledges that he didn't have direct information on the subject.

The Court: That is granted. It involves volunteer statements which are not responsive.

Reading of deposition resumed at line 10, page 18:

At line 24, page 18:

Mr. Koch: Mr. Allen poses an objection that he wasn't there, was he, and Mr. Elliott said, "No." Then Mr. Allen inquired if he had any personal knowledge of it.

The Court: I think you had better proceed with the next or some other appropriate question. The objection is sustained.

Reading of deposition resumed at line 5, page 19:

At line 10, page 19:

The Court: The objection is overruled.

At line 13, page 19:

The Court: The answer may stop at the word [427] "telephone." Do you object to the rest of it?

Mr. Koch: To "telephone" is agreeable.

The Court: The first line of the answer, to the word "telephone" is permitted. The rest will be stricken.

At line 18, page 19:

The Court: The objection is overruled.

At line 20, page 19:

Mr. Koch: I object to that answer, your Honor.

The Court: The objection is overruled.

At line 25, page 19:

Mr. Koch: That is hearsay, your Honor.

The Court: I would be inclined to think so. Do you know any reason why it wouldn't be? There is no foundation. He hasn't shown the telegram has been lost or inadvertently laid aside or anything of that sort. Its absence must be accounted for in some reasonable way.

Mr. Riley: It is true, it isn't. On the other hand, he is testifying as of his own personal knowledge of a telegram.

The Court: The objection is sustained as to the reading of the contents of a telegram.

Reading of deposition resumed at line 4, page 20:
At line 17, page 23:

Mr. Koch: I object to the answer, your Honor, at line 17, page 23. He isn't testifying from his own knowledge, and I don't know what the record he is referring to is.

Mr. Riley: I don't have anything to say, your Honor. I think it is already in the record, and I withdraw the question.

The Court: The question and answer are withdrawn and stricken.

Reading of deposition resumed at line 18, page 23:

At line 13, page 32:

Mr. Riley: I object to that question as beyond the scope of direct examination, and, further, that it brings in matters which are not admissible and are irrelevant for the reasons I stated earlier when we were examining Mrs. Bloth, that insurance and social security and these matters are not admissible

in evidence and should be kept from the record.

The Court: Have you any law you wish the Court to consider?

Mr. Riley: Yes, your Honor. I repeat the cases I cited at that time. At that time, I cited three Washington cases, *Criez vs. Sunset Motors*, 123 Wash. 604, and 73 Wash. [429] 177, that stated that life insurance or social security benefits—pardon me, your Honor. The first case, *Criez*, dealt with life insurance, stated it was not relevant to damages, that damages are not diminished by benefits accruing from insurance or pensions.

In the second case, that involved a pension fund.

The Court: What number?

Mr. Riley: 73 Wash. 177, *Heath vs. Seattle Taxi*.

The Court: Do you have the third case? You said you cited three.

Mr. Riley: I apologize, your Honor. I am only citing these two.

The Court: You may proceed.

Mr. Riley: *Heath vs. Seattle Taxi*, 73 Wash. 177, dealt with a police fund for injured policemen. The plaintiff had contributed his own money to the fund, and, as in the *Criez* case, they refused this evidence.

The Court: That is sufficient.

Mr. Koch: Your Honor, I don't understand that that makes this evidence inadmissible. It is within the scope of direct examination. He questions there about his income, about the kind of work he did, about his health, all leading. The

only relevancy of any of it was to show that he would have been able to earn and provide for his family, and here to the extent that he has earned and [430] provided for his family, and that he has done so in a way that is inuring to the benefit of the family, is a matter that is appropriately to be considered by the Court.

The Court: The Court on the cases cited sustains the objection.

Mr. Koch: These cases—I am not sure if they are wrongful death cases or whether it is——

The Court: We will proceed on the Court's ruling. If you find a later case that seems to overrule them or limit them, I will be glad to have that later.

Mr. Koch: Does your ruling——

The Court: Sustains his objection. Leave out the reading of anything relating to insurance. Proceed.

Reading of deposition resumed at line 20, page 32:

At line 2, page 33:

Mr. Riley: I will object to this question for the same reason.

The Court: Sustained. What is the attitude of counsel regarding the rest of the page, from line 10?

Mr. Koch: Your Honor, that is highly relevant for the reason that if certain kinds of claims are filed, it could be a bar to this kind of action.

Mr. Riley: I think that they are entirely irrelevant as to this estate, what anyone else made, and

I think they [431] would also be irrelevant as far as the defendant is concerned, that this man, as a member of the service, had some claim against the Government arising from his death.

The Court: That this witness had a claim?

Mr. Riley: The testimony is here that this witness had a claim. I think it is irrelevant.

The Court: The Court will overrule the objection on the ground that it relates to this witness' credibility. That is the only basis I see how it could help, because I do not know what the extent to which the decedent was supporting or providing for the support or for the welfare of the witness, his father, had to do with the value of this estate, when I suppose there is no proof or intention of offering proof that his father was one of his beneficiaries of that wrongful death claim. You do not intend to urge that, do you?

Mr. Riley: No, your Honor.

The Court: It is only for the purpose of testing credibility.

Reading of deposition resumed at line 10, page 33:

At line 23, page 34:

Mr. Riley: I object to the question.

The Court: Sustained.

Reading of deposition resumed at line 5, page 35: [432]

At line 22, page 35:

Mr. Riley: I object for the same reasons, same authorities, if the Court please.

Mr. Koch: Those are not authorities with respect

to social security, your Honor. It shows what his earnings were devoted to, and that there were benefits by reason of his service.

The Court: I am going to overrule it in this instance. However, Mr. Riley, if you have a case further in support on this particular issue, I will consider it further. I wish something expressly in point on this modern social security issue. I think all of it is a kind of compensation which comes to the person receiving it by virtue of an arrangement which the arranger had with the public authorities.

Mr. Riley: I selected the case of Heath vs. Seattle Taxi because, although it didn't get into a social security case exactly, it is a pension fund where they contributed as they do in social security. I am sure the Court will take judicial notice that the person who is covered by social security contributes to the fund in the same manner as they do insurance.

The Court: The ruling will stand, subject to being changed if I find an authoritative decision requiring it. [433]

At line 14, page 36:

Mr. Koch: I am skipping a little of this material, your Honor.

The Court: Is this a discovery deposition?

Mr. Riley: No, your Honor, it was not intended. Counsel rambled a little bit.

The Court: I think this is not proper, then. It is objected to by Mr. Elliott on page 37.

Mr. Koch: Down to line 17, page 37.

The Court: You may proceed.

Reading of deposition resumed at line 17, page 37:

At line 2, page 38:

The Court: Do you wish to read the redirect examination?

Mr. Riley: I think it has all been covered, your Honor. There are a few questions, starting at line 25, page 38.

Reading of deposition resumed at line 25, page 38.

At line 13, page 39:

Mr. Riley: I will strike the rest of the questions, your Honor.

The Court: Do you wish to read any of it?

Mr. Koch: I would like to finish the deposition [434] from there, your Honor.

Reading of deposition resumed at line 13, page 39:

At line 19, page 39:

Mr. Riley: I will object to that question for the same reason.

Mr. Koch: This has nothing to do with the child.

The Court: The objection is overruled.

Mr. Koch: That is the end of it, your Honor.

The Court: This deposition is received in evidence—do you offer it as such?

Mr. Riley: I do so offer it, your Honor.

The Court: —as a part of plaintiffs' case in chief to the extent that it was read by plaintiffs and

at plaintiffs' request, and that portion which was read at the request of defendant is received in evidence out of order as a part of defendant's case in chief with like effect as if the witness was here and testifying personally and orally from the witness stand.

This case is now recessed and the Court is recessed until 1:30 o'clock this afternoon. All are excused until then.

(Recess.)

The Court: All are present. You may proceed.

ALVIN B. OPSAHL

having been previously sworn, resumed the stand for further examination:

Direct Examination

Q. (By Mr. Riley): Mr. Opsahl, the last question I asked you prior to our recess: "Do you feel that this is a sufficient supply of emergency lighting in aircraft?" and you stated at that time "Yes". Do you recall that? A. Yes, I remember that.

Q. Is it considered to be a sufficient supply of emergency lighting equipment at this time by you and by Northwest Airlines? A. Yes.

Q. Are there no additional lights supplied now in DC-4 type aircraft?

A. They are improving the lighting system right along, but there hasn't been much of a change.

Q. Do you know where these lights were stowed in the aircraft?

(Testimony of Alvin B. Opsahl.)

A. Yes, one was stowed in the forward part of the cabin, and the other was stowed by the main passenger door.

The Court: What kind of light is that?

The Witness: Emergency lantern with either two or three flashlight batteries. The size of it is about [436] four by five. It is about an inch and a quarter deep. The lens on the lantern is close to two inches, one and a half to two inches. We don't use that type of lantern today.

The Court: One emergency lantern?

The Witness: Two emergency lanterns.

The Court: It was aboard the ship at the time of the accident?

The Witness: Yes, sir.

Q. After January 19, did you furnish the company any reports relating to Flight 324 of ship 601 of Northwest Airlines which crashed at Sandspit?

A. No, I didn't.

Q. Did you ascertain for your own information whether or not the life jackets that were installed were the same type as described in the passenger instruction literature which is identified as Plaintiffs' Exhibit 13? May the witness see Plaintiffs' Exhibit 13?

The Court: It will be shown to him. Where did you say these lanterns were stowed?

The Witness: One was stowed at the forward part of the cabin, and the second one was stowed by the main cabin door, which is near the rear part of the cabin.

(Testimony of Alvin B. Opsahl.)

Mr. Riley: Read the question, please.

(Last question read by reporter.) [437]

A. I didn't feel it was necessary, because our people don't release the airplane unless they have the proper type of life vests on the aircraft.

Q. Were you advised as to any findings of the Civil Aeronautics Board concerning the type of Mae Wests installed in the aircraft? A. No.

Q. You are the senior supervising safety inspector? A. Yes.

Q. Isn't it your business to be concerned with Civil Aeronautics Administration reports and see that the company has complied with regulations of the Civil Aeronautics Board?

A. That is right.

Q. Did you ever see any Civil Aeronautics Board report regarding the crash of Flight 324?

A. I don't believe I have.

Q. Were you ever advised that the life jackets installed in the aircraft were different than those described in the literature aboard the aircraft instructing the passengers in the use of equipment aboard the aircraft which crashed? A. No.

Q. I will pose a hypothetical question. Assuming a Northwest Airlines aircraft departed Anchorage, Alaska, for Seattle, is en route to Seattle and is over water and is flying approximately 10,000 feet and there is an engine failure: [438] as senior supervising safety inspector for the western region of Northwest Airlines, would you say that the com-

(Testimony of Alvin B. Opsahl.)

panty procedure would require that the passengers aboard the aircraft be advised of emergency——

Mr. Koch: I object, your Honor, to the question. This witness is not an expert witness.

The Court: The objection is overruled.

A. I don't feel I am qualified to answer that question. I refer that question to one of the boys that are more qualified.

Q. I will ask you to answer the question to the best of your knowledge, information and belief.

Mr. Koch: I object again, your Honor, to the posing of a technical question to this witness, who is not an expert. He testifies that he is the senior supervising safety inspector, in charge of life rafts and life gear, and the hypothetical question deals with whether, in this witness' judgment, the passengers should be notified of the existence of a three-engine operation. This is not within his knowledge or within the scope of his duties.

The Court: The objection is overruled. If he knows, he may answer.

A. I wouldn't be able to answer that question, because I don't know.

Mr. Koch: He said he didn't know. Mr. Riley is [439] pressing him for an answer, anyway.

The Court: The objection is overruled.

Q. Who would be able to answer that question in Northwest Airlines? Who is responsible for ascertaining and developing the policies of Northwest Airlines with respect to emergency procedures when an aircraft loses an engine over water on a flight?

(Testimony of Alvin B. Opsahl.)

A. The captain of the aircraft. He is the commander of the aircraft.

Q. Isn't there any established policy or records, as senior supervising safety inspector, advising what the general safety procedures would be in such a situation?

A. That information would be in the flight manuals. I am not concerned with the flight manuals.

Q. Assuming the same situation, passing to another problem: as senior supervising safety inspector, would you say that the literature on the aircraft and the ditching procedures in the aircraft and the demonstrations of jackets and life rafts in the aircraft should conform to the interior of the particular aircraft at the time?

Mr. Koch: I object to that question, your Honor. The manual provisions speak for themselves, and this witness is not——

The Court: The objection is overruled.

A. This ditching folder gives the passengers a preliminary [440] idea of what is aboard the aircraft and to—from the way I understand it, it is up to the people who are flying the aircraft, the steward and stewardess, to give the proper instruction. That is the way it is today. At that time, I don't know how it was. I have never ridden in an aircraft over the water.

Q. Do you believe that the entire responsibility is on the crew of the aircraft?

A. That is the way the management has the information published to these people.

(Testimony of Alvin B. Opsahl.)

Q. You don't feel it is your responsibility to see that the literature which is installed in the aircraft does conform to the particular configuration of the aircraft that the literature is installed in?

A. These folders, to the best of our knowledge, were for the particular aircraft, yes, for this TWA airplane.

Q. But you have examined Mr. Pitcher's report and you have compared the other folder which is installed in the aircraft and they do differ, isn't that correct?

Mr. Koch: I object to the manner of questioning. This witness is not an adverse witness, and Mr. Riley is asking leading questions and directing answers.

Mr. Riley: That is a leading question, of course. I feel I should be entitled to lead him. As a matter of fact, it was my recollection of his previous testimony—— [441]

The Court: If you think he has testified on it before, the objection is sustained.

Mr. Riley: It seems he raised an inconsistent——

The Court: Avoid repetition. The objection is sustained.

Q. Assuming the situation which was described earlier on an aircraft en route from Anchorage to Seattle, flying over water at 10,000 feet and having lost an engine, do you feel as senior supervising safety inspector for the western region of Northwest Airlines that the crew should have located and

(Testimony of Alvin B. Opsahl.)

readied the life rafts that were installed in the aircraft? A. That isn't my responsibility.

Mr. Koch: Again, I object. This is assuming facts which are not in evidence, and this witness has already testified he was in charge of inspection, not installation of these life rafts.

The Court: The objection is overruled. Would you like to have a running objection as to all these questions as to this witness' knowledge or information touching the operation of aircraft, in view of some of these matters that are coming up?

Mr. Koch: I would, your Honor.

The Court: Let the record show that, and it will not be necessary for you to interrupt. [442]

Mr. Koch: The hypothetical question is assuming facts not in evidence, and I feel that is another proper ground for objection.

The Court: The objection is overruled. There is a running objection to that effect. Read the question.

(Last question read by reporter.)

A. I have never had any training on ditching, so I wouldn't know the answer to that question.

Q. What is your particular personal opinion, in the absence of training.

Mr. Koch: I object to this question, your Honor.

The Court: If you have one.

Q. If you have one.

The Court: The objection is overruled.

A. If it is an extreme emergency, I would say yes.

(Testimony of Alvin B. Opsahl.)

Q. Should the emergency lights for the interior which you have described earlier be located and readied for use?

A. They are located. They are in a permanent location. It is up to the people aboard the aircraft to light the lights as they see fit.

Q. Do you feel that the emergency lights should have been turned on? A. I wouldn't know.

Q. In your opinion, your own feeling?

A. I don't know. I couldn't answer that question. [443]

Q. After the plane came to rest in the water, do you feel they should have been turned on?

A. The cabin was flooded with several feet of water by that time. I don't know how the people reacted in that kind of extreme emergency.

Mr. Riley: I have no further questions.

The Court: Is there anything further, realizing that he may be called and probably will be by defendant?

Mr. Koch: Your Honor, I don't intend to call him. I will not cross examine this witness at this time.

The Court: You may step down. Call the next witness.

(The witness was excused.)

Mr. Riley: Mr. Smith.

The Court: Do you call him as plaintiffs' witness?

Mr. Riley: We call him as an adverse witness, as an employee of the defendant airlines. We will

show that he was the flight controller on the night of the accident.

Mr. Koch: Your Honor, this is the first time that we have been over this point, about whether a witness such as Mr. Smith is an adverse witness. He is not the managing agent of the corporation. Mr. Riley knows he is not. He knows what the Court has already ruled with respect to Mr. Pitcher and Mr. Opsahl, and I object to the effort to call him as an adverse witness.

The Court: What is there different in this case from [444] the others?

Mr. Riley: I can't show much, as a matter of fact, your Honor. Just for the record, I would like to renew my exception to the ruling that I cannot examine him as an adverse witness.

The Court: The Court sustains the objection. You may note an exception to that ruling. The witness, if you examine, will be regarded as a witness called by the plaintiffs.

CHARLES E. SMITH

called as a witness by plaintiffs, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riley): Would you state your full name? A. Charles E. Smith.

Q. Where do you reside?

A. At 15423 10th Avenue South.

Q. Are you employed by Northwest Airlines?

(Testimony of Charles E. Smith.)

A. Yes.

Q. Were you employed by the defendant Northwest Airlines on January 19, 1952?

A. Yes. [445]

Mr. Riley: Would the clerk withdraw from the pretrial order Exhibit A-5?

The Court: That will be done. In what capacity were you employed at that time?

The Witness: At that time I was employed as a flight superintendent.

Mr. Riley: Exhibit A-5 is entitled "Flight Position Log Flight 324, January 19".

Q. Are you still employed in the same capacity, Mr. Smith?

A. That is correct, but the title has been changed to that of flight dispatcher.

Q. Could you describe your duties at the time on January 19, 1952? What was your capacity then? What were your specific duties?

A. My capacity at that time was flight superintendent, which is approximately the identical position which I hold today as a flight dispatcher.

Q. Were you in communication with Flight 324 on the night of January 19, 1952, the defendant's Flight 324?

A. No, I was not.

Q. At any time did you transmit a message to Flight 324 on that night?

A. Yes, I did.

Q. Did you receive any messages from Flight 324?

A. After the accident, as I recall, the acknowledgment of [446] my message was received by me.

(Testimony of Charles E. Smith.)

Q. Was it possible for you to communicate directly with Flight 324? A. No, it was not.

Q. Why was that?

A. That is because at that time our flights were reporting to the CAA radio stations, which in turn relayed the information to us, and it was through this means of relay that we had to transmit messages back and forth.

Q. What time delay was involved in the transmission of the message to Flight 324, assuming if it were over Sitka, Alaska, and you wished to communicate with Flight 324 and it was in-bound, what time delay would be involved in relaying that message to the flight from your office in Seattle?

Mr. Koch: The question is leading. It assumes there is a delay. It is quite a long question, I am not sure if there was any more than that involved. I'm not sure I understand it.

The Court: Ask the witness a supposititious question properly conditioned on the evidence or testimony up to this time, or else find out if he has knowledge that is involved.

Mr. Riley: I will strike the question.

Q. Assuming that a Northwest Airlines aircraft on January 19, [447] 1952, was en route to Seattle from Anchorage and was abeam the west leg of the Sitka radio station and you wished to communicate some direct message to the aircraft from Seattle through the Civil Aeronautics Administration channels: how much time would be involved in transmitting the message to the ship, if you know?

(Testimony of Charles E. Smith.)

A. I would like to answer the question this way:

The Court: Can't you answer directly, and then we will see if anything else is needed.

A. I do not know, because the flight wasn't in my control area at the time.

Q. In whose control area was it?

A. It was in Anchorage control area.

Q. At what point between Anchorage and Seattle would the ship come under your control?

A. About halfway between Anchorage and Seattle, which is southwest of Annette Island.

The Court: Where was it that the flight came under your control or under your direction before the crash, if it did? State where the plane was in flight before the crash, if it was in flight before the crash, at the time of your taking over the direction of the flight.

The Witness: The flight at the time of the crash was approximately halfway between Anchorage and Seattle, and because this flight was in-bound——

The Court: That is, to Seattle?

The Witness: ——in-bound to Seattle, my actual control would be at approximately that point. However, in this event the Anchorage control and the Seattle control would overlap and each of us would give all assistance possible.

Q. Did you communicate with Anchorage flight control? A. Yes.

Q. Do you recall what steps were taken or what decisions were made between Anchorage and yourself?

(Testimony of Charles E. Smith.)

A. There were no decisions made, because in the case of engine-out operation, the pilot makes the decisions on the operation, and I give any information relative to safety in regard to weather conditions and facilities to him that he may ask for.

Q. What information, if any, did you transmit to Flight 324 after it was reported that his No. 1 engine had failed?

A. Even though the flight was——

The Court: Answer directly. That “even though” sounds as if you are making a comment that is not asked for in the question.

A. I transmitted a message to the flight to ask him his intentions.

Mr. Riley: I would like to show the witness Plaintiffs’ Exhibit 6. I will show it to counsel. I will ask it be [449] admitted in evidence at this time. It is identified and attached to the pre-trial order, the aeronautical chart.

Mr. Koch: This isn’t the one we agreed to on the pre-trial order.

Mr. Riley: This is the one we agreed to on the pre-trial order. It came out of the pre-trial order just a moment ago. Paragraph 6 of the pre-trial order states, “Exhibit 6 attached hereto is an aeronautical planning chart prepared by the United States Air Force, distributed by the United States Coast and Geodetic Survey.” I think the relevancy of the document is self-explanatory. I am particularly interested in showing to the Court the route between Anchorage and Seattle and Sandspit.

(Testimony of Charles E. Smith.)

The Court: Let the witness see it. What have you shown the witness so far as the pre-trial order is concerned? Do you wish to identify it with something already before the Court?

Mr. Riley: No, your Honor. I wish to ask him to identify on the chart——

The Court: What chart?

Mr. Riley: Plaintiffs' Exhibit 6, which was obtained from the United States Coast and Geodetic Survey, as stated in Paragraph 6.

The Court: State it in your question. The Court really isn't concerned with Paragraph 6. State in your [450] question, "Showing you such-and-such a thing, describe the thing as to what it is."

Q. Showing you what has been identified as Plaintiffs' Exhibit 6, Mr. Smith, I will ask you to refer to the chart and the route designated thereon as the Anchorage-Sandspit route and indicate at what point you as flight superintendent for this area would have assumed control of Flight 324 on January 19, 1952.

Mr. Koch: Before you answer it, I object to the question, your Honor. It refers to a document which is not in evidence, and it assumes that the aerial routes on that map were the routes flown under this military flight, which is certainly a fundamental issue in the case.

The Court: The objection is overruled.

A. I would assume control of the flight southwest of Annette.

(Testimony of Charles E. Smith.)

The Court: Is Annette shown on that chart, Plaintiffs' Exhibit 6?

The Witness: Yes.

Mr. Riley: Request the Court, if the Court please, that this witness be permitted to mark the point at which he would assume control and initial the same.

The Court: The Court directs that he is permitted to do so and to conform with the request.

Mr. Riley: May the record show that the witness has marked this point as X, with a blue pencil, the point at [451] which he assumed control of Flight 324 on that date.

The Court: At what place on the map?

Q. Would you state where you have indicated you assumed control, as nearly as you are able to describe it?

Mr. Koch: Your Honor, again we are getting into a difficult question. The witness testified that he would assume control of the flight southwest of Annette. He has never testified that he did assume control at that point.

The Court: The objection is overruled. He may perform this question, if he can.

A. From Annette in a direction southwest crossing the airway would be the point that I would assume control of the flight.

The Court: Have you pointed out on that map where that point is?

The Witness: Yes.

The Court: In what manner have you done so?

(Testimony of Charles E. Smith.)

The Witness: I marked it with a blue pencil, an X.

The Court: Near what prominent place indicated on that chart is that X marked?

The Witness: I would say approximately five minutes northwest of the north end of the Queen Charlotte Islands.

The Court: Do you mean minutes of flight?

The Witness: Yes.

Q. Approximately how many miles northwest of Sandspit would that position be? [452]

A. That would be approximately sixty miles, to the best of my knowledge, in looking at this chart. May I correct that, please? That would be approximately seventy miles.

Mr. Riley: I would like to offer this in evidence at this time, your Honor, and I wish now to refer to the Defendant's Exhibit A-5, which has been taken from the pre-trial order. I presume that will have to be marked as a plaintiffs' exhibit, or however the Court wishes to handle that.

Mr. Koch: I object to the offered exhibit, your Honor, on the ground that there is no evidence at all that establishes that the flight in question was proceeding on the airways from which these measurements were taken. As a matter of fact, I believe it was not proceeding on any such record.

The Court: The objection is overruled. You are not testifying now. The Court is ready to rule on the offer.

Mr. Koch: Shouldn't the purpose for which it is

(Testimony of Charles E. Smith.)

offered be limited so that if it is introduced for the purpose of measuring where this witness assumed control of the flight or was supposed to have done so, that is one thing, but if the other marks on that map are considered also before the Court, I renew my objection.

The Court: The objection is overruled. The Court is ready to rule upon the offer. This chart, marked as Plaintiffs' Exhibit 6, is now admitted.

(Plaintiffs' Exhibit 6 for identification received in evidence.)

Mr. Riley: To clarify any problems with respect to A-5, it is taken from the pre-trial order. Because we will refer to it extensively, I would like to offer it in evidence at this time, just to clarify any problems that might arise. It is defendant's document.

Mr. Koch: I have no objection to A-5, your Honor.

The Court: On plaintiffs' motion, Defendant's Exhibit A-5 is now admitted.

(Defendant's Exhibit A-5 for identification received in evidence.)

Q. Referring to what has been marked and admitted as Defendant's Exhibit A-5, can you identify the same?

The Court: State, if you know, what it is.

Q. If you know what it is, will you state what it is?

A. Exhibit A-5 is a copy of the reports relative to Flight 324 of the 17th.

The Court: What kind of reports?

(Testimony of Charles E. Smith.)

The Witness: Flight reports and messages relative to the flight.

Q. Will you state, if you know, why the flight is designated 324/17?

A. Because it leaves Tokyo on the 17th, and Tokyo is nearly a day ahead of us in time, so the flight departing Tokyo [454] on the 17th would also arrive in our area on the 17th.

Q. Referring to the top of page 1 of A-5 which you have before you, and the portions marked "Flt plan" there, what appears to be code or abbreviations, can you translate that code?

A. The first portion was flight plan. The first line, ZT is Port Hardy, QQ is Comox, SEA is Seattle, and CYVR is the code for Vancouver.

Mr. Riley: If the Court please, A-5 is in abbreviated code. It is standard code for Civil Aeronautics and flight plan procedures. I can read it, Mr. Smith can read it. Since there is no objection to the exhibit, I think it would expedite things if Mr. Smith could just read these things as he interprets them into the record, because they are largely in code.

The Court: Do you have copies before you?

Mr. Koch: I do, and I have no objection to this suggestion, but I would like to see this exhibit.

The Court: Let him see it for a moment. You may ask the witness to do that.

A. The first message is addressed to Airways Traffic Control, Northwest Airlines. Northwest MATS—that means we are operating the flights for

(Testimony of Charles E. Smith.)

the Military Air Transport—Northwest MATS
324 DC-4 Pfaffinger Elmendorf IFR.

Mr. Koch: What do those things all mean? [455]

The Witness: Elmendorf is the—Elmendorf is well understood. IFR means Instrument Flight Rules.

The Court: Is Elmendorf at Anchorage or Fairbanks?

The Witness: Elmendorf is at Anchorage. 10,000 feet. The next code is AL. That is a transmission error. It should be A1, which means the route Amber 1. Amber 1 to Whittier direct to Sandspit via Middleton Island. True air speed 210. Estimated time en route 6 hours and 50 minutes. 11 plus 00 means that that is how much fuel is aboard the aircraft, 11 hours fuel aboard the aircraft. The alternate is Boeing Field in Seattle. The flight departed Elmendorf at 0511 Zebra time. The ship number is NC 45342. Signature, Allen, Northwest Airlines OW. The OW is a transmission error, as far as I can determine. The time the message was filed was 190511 Zebra.

Q. Referring to the time of departure from Elmendorf as 0511 Zebra, would you explain what that means?

A. That means that is the time the flight was airborne, actually off the ground.

Q. Does Zebra time refer to Greenwich time?

A. That is correct.

The Court: Why do you use Zebra?

The Witness: We use Zebra time because of the

(Testimony of Charles E. Smith.)

fact that our flights from Tokyo to New York go into so many time zones, crews from Tokyo to Seattle go through several [456] different time zones, and in order not to confuse us, we keep all times in Zebra time, which are the same around the world. There is no different time zone when Zebra time is used.

Q. Interpolating 0511 Zebra, could you state what that would be in Pacific Standard Time?

A. The flight departed on Anchorage time.

Q. Interpolate it into Anchorage time.

A. That would be ten hours before 0511 Zebra. The time would be 1911 Anchorage time.

The Court: That does not mean anything. What time is that?

The Witness: That would be 7:11 P.M. Anchorage time, or 9:11 P.M. Pacific time.

The Court: That means Seattle time, does it not?

The Witness: That means Seattle time.

Q. And on what date was that?

The Court: Is that what you mean?

The Witness: That is correct.

Q. On what date did the flight depart Anchorage?

A. As I recall, he would depart Anchorage on the 17th.

Q. Referring to the date-time group at the conclusion of the message, 190511 Zebra.

A. He would have departed on the 18th at 7:11 P.M. Anchorage time, or on the 18th, 9:11 P.M. Seattle time. [457]

(Testimony of Charles E. Smith.)

Q. Would you read the next message?

A. The next message is almost a duplicate message of the other, only in a different form, sent to Vancouver and Seattle and Airways Traffic Control and to Tacoma or McChord Air Force Base, and it states: MATS—M stands for MATS—Northwest 324 DC-4 Pfaffinger Elmendorf 10,000 Amber 1 to Whittier direct to Middleton Island direct to Sandspit Amber 1 Blue 32 Amber 1 to Tacoma. The next code letter is evidently a duplication of the first one. The true air speed is 210 knots, and the next code letter is evidently a transmission error again. It says N/VFR. It should read, if it corresponds to the preceding one, should read IFR.

The Court: What difference does this make on whether or not the defendant was negligent, Mr. Riley?

Mr. Riley: The only thing I want to do is show the flight of the aircraft, and I want to show the position of the aircraft. I think it is well known to counsel. I wanted to point out on the chart and read position reports to get to the point where Mr. Smith assumed flight control and show the transmissions emanating from the aircraft.

(Discussion among court and counsel.)

Q. Are you familiar with the transmissions and position and track of Northwest Airlines Flight 324 from Anchorage to Sandspit on the night of January 19, 1952? [458]

A. Yes.

Q. Could you trace on the map with the pencil you have the course, approximate track of the air-

(Testimony of Charles E. Smith.)

craft from Anchorage to Sandspit? A. Yes.

Q. Would you do so?

A. I have done so in red pencil.

Mr. Riley: I would like to state to the Court that the red pencil follows exactly the designated Sandspit to Anchorage route which is shown on the chart by the Air Force, which is what I tried to do earlier.

The Court: Proceed.

Q. Are you able to place the position at which Flight 324 on the 19th of January, 1952, feathered or lost its No. 1 engine?

A. I can show the approximate location.

Q. Would you refer to A-5 which you have before you, and take the sixth message there, and indicate where the pilot first reported the loss of the No. 1 engine?

The Court: By that do you mean to ask this witness to state if he can from that information at what place the plane was when that engine was lost?

Mr. Riley: That would be the better way to phrase it.

A. I can give the—I didn't understand the question.

The Court: Redraft the question. [459]

Q. Referring to Exhibit A-5, approximately the sixth message transmitted from Flight 324 on the 19th of January, 1952, are you able to determine where the aircraft was at the time it was first reported that it had lost its No. 1 engine?

A. I can determine the approximate location.

(Testimony of Charles E. Smith.)

Q. Would you mark that position with the number 1 and your initials?

The Court: That place which you say would be approximate.

A. I have done so.

Q. Would you read the message from the aircraft which first reported the feathering or the loss of its No. 1 engine?

A. A message addressed to Northwest Airlines: No. 1 engine feathered. Proceeding Sandspit. Signed Captain NWA 324.

Q. At what time was that message transmitted?

A. It was—do you mean transmitted from the flight or to—

Q. What time was it transmitted from the flight, if you are able to judge?

A. At 190803 Zebra or nearly three hours after the flight had departed Anchorage.

The Court: Mr. Smith, by the phrase in that statement “engine missing” what do you understand that to mean?

The Witness: The message read: No. 1 engine feathered. Proceeding Sandspit. [460]

The Court: Didn't it say something about something missing?

The Witness: Yes, I believe later on.

The Court: In connection with your speaking of feathering, didn't you say something about something missing, or didn't counsel in his question?

Mr. Riley: I think I probably erred and misstated a question.

(Testimony of Charles E. Smith.)

The Court: I wish you would withdraw the question and put a proper question to him.

Q. Would you state what is meant by the report than an engine was feathered?

A. We were discussing at that time—what was missing was part of the message was missing, and I never completed decoding the message.

The Court: Is there anything on that exhibit which you are now considering in connection with this line of questions which says anything about the engine missing?

The Witness: No.

The Court: Then eliminate the “engine missing” from anything that has been asked.

Q. Would you explain what is meant by the report “No. 1 engine feathered”?

A. It means that the pilot for some precautionary reason decided to stop the engine and not use it, based on some [461] reasons that were not reported at the time.

Q. When feathering is accomplished, what, if you know, is the condition or position of the propeller on the engine involved?

A. The position of the propellers, the blades are flattened so the rotation of the engine is stopped.

Q. The engine is still intact on the aircraft?

A. That is correct.

Q. Would you read from Exhibit A-5 the last reported position report of the aircraft prior to the time it feathered the engine?

A. Northwest 324 southwest of Gustavus at 0730

(Testimony of Charles E. Smith.)

Zebra, 8,000 feet, estimated southwest of Sitka at 0757 Zebra.

Q. Would you indicate on the chart by number 2 and your initials the position of the aircraft at the time of the transmission of that message?

A. Again I would like to make reference, this is the approximate location. I have no ruler here to compute the exact location. Do you want me to initial this also?

Q. Please. Referring to Exhibit A-5 which you have before you, would you read the first message which you received or transmitted on the morning of January 19, 1952, relating to Flight 324?

A. The first message reads: Advise if landing—did you say the first message sent or received? [462]

Q. The first message sent or received by you, according to Exhibit A-5.

A. The first message I received relative to the engine feathered was the one that I read: No. 1 engine feathered. Proceeding to Sandspit. Captain, NWA 324, filed 190803 Zebra.

Q. Did you contact Elmendorf Flight Control?

A. I forwarded a message, yes.

Q. Would you read that message, please? I will refer to the first message from the bottom of page 1, signed by Smith of Seattle Flight Control. Would that be you?

A. Yes. I sent a message to Anchorage. "Message from CAA in Yakutat 190820 Zebra advised No. 1 engine feathered proceeding Sandspit, Cap-

(Testimony of Charles E. Smith.)

tain NWA 324", filed at 190803 Zebra, and my signature, Smith.

Q. At what time in Anchorage time did you transmit that message?

A. That would be at 10:03 P.M. Alaska time.

Q. Pacific Time would then be 12:03 A.M., is that correct?

A. It would be, yes, three minutes after midnight Seattle time.

Q. What is the next message that you sent or received relative to Flight 324?

A. The next message I sent stated: "Advise if landing at Sandspit or proceeding to Seattle. Seattle weather Okay."

Q. And by whom was that signed?

A. That was signed by me. [463]

Q. At what hour Anchorage time was that message transmitted?

A. At 10:40 P.M. Anchorage time.

Q. And in terms of Seattle time, what time would that be?

A. It would be 12:40, or 40 minutes past midnight.

Q. Did you receive a message from Flight 324 in response to that message?

A. I don't recall at this time receiving——

Q. Would you read the second message from the bottom of page 1 of Exhibit A-5?

A. "Northwest 324 oil cooler No. 1 engine broken. Proceeding to Sandspit."

Q. At what time was that message transmitted?

(Testimony of Charles E. Smith.)

A. That message was transmitted at 29 minutes after midnight Seattle time.

Q. Referring to Exhibit A-5, was Flight 324 advised of weather between its last reported position and Seattle on any other message other than the one you sent to him at 12:40 A.M. Seattle time?

A. I do not know, because he was in contact—

Q. Are any messages contained in A-5 weather reports which were transmitted to him?

Mr. Koch: I would like to have the witness given an opportunity to answer the last question.

The Court: Read the question.

(Last question read by reporter.) [464]

The Witness: With the CAA radio stations.

Q. Would you read the message commencing at the bottom of page 1, top of page 2, Exhibit A-5?

A. This is a message addressed to Northwest Flight 324, sent by our Seattle meteorologist at my request to give the flight a forecast of what the Sandspit weather would be, and also the Annette weather, Comox weather, Seattle, Tacoma and Portland weather upon the flight's arrival in the event that the captain chose to land at Sandspit or continue on to the Seattle area.

Q. Would you read what the weather reports were for those positions as contained in that message?

A. These are not weather reports. They are a forecast. "Terminal forecast your arrival times Sandspit 2,000 feet broken to overcast clouds, occasionally"—I can't decipher the next two letters of

(Testimony of Charles E. Smith.)

"LT," except that it might mean 1,000 occasionally 1,000 overcast—"one mile and light snow."

At the top of page 2: "Port Hardy weather, 3,000 feet, overcast, occasional light rain and light snow."

The next one is Annette weather: "1,500 feet broken clouds"—the next three letters I can't decode at this time. It appears to be a transmission error again. I will correct that, I would like to read that again. I have it decoded. Annette weather: "1,500 feet broken [465] clouds, occasionally 700 feet, sky obscured, visibility one mile with light snow showers."

Comox and Patricia Bay: "5,000 feet, broken clouds."

Seattle-Tacoma: "2,000 feet, broken clouds, 4,000 feet, overcast."

Portland: "1,200 feet, overcast."

The signature is Seattle meteorologist, and it is filed at 191249 Pacific Standard Time.

Q. According to that report, are you able to state whether or not the forecast called for any precipitation at all at Sandspit?

A. I do not know.

Mr. Koch: I think the exhibit speaks for itself.

The Court: The objection is overruled.

A. I do not know.

Q. Would you read the next position report of Northwest Airlines Flight 324? It is the second message on the top of page 2 of A-5.

A. "Northwest 324 southwest of Sitka 0804

(Testimony of Charles E. Smith.)

Zebra, 8,000, Estimating Southwest of Annette at 0859 Zebra." Signed Yakutat at 190810 Zebra.

Q. Would you read the next position report of Flight 324?

A. "Northwest 324 southwest of Annette at 0859 Zebra, 8,000 feet, estimating over Sandspit at 0928 Zebra." Signed Annette at 190903 Zebra.

Q. And what time did he make this position report, Pacific Standard time?

A. The last report?

Q. Yes.

A. That would be 1:03 A.M. Seattle time.

Q. Would you read the next report from Flight 324?

A. Addressed to Northwest Airlines: "Annette advises Northwest 324 landing Sandspit." Signed Seattle at 190943 Zebra, or 1:43 A.M. Seattle time.

Q. From the period of 1:43 A.M. Seattle time back to the time of your last transmission to Flight 324, which was 12:40 A.M., did you send any other communication to Flight 324?

A. I do not recall that I did.

Q. Did you advise the Elmendorf Flight Control or the military authorities that Flight 324 had lost an engine?

A. I advised our Anchorage office of the situation, which I believe there is a message in this exhibit stating that.

Q. Did you advise the Coast Guard or any of the Air Sea Rescue facilities that Northwest Airlines was operating with one engine out?

(Testimony of Charles E. Smith.)

A. I did not do so personally, but my assistant did under my direction.

Q. Is that message contained in this report?

A. No, it wouldn't be.

Q. Referring to Exhibit A-5, would you indicate the first [467] message which you received indicating the crash of Flight 324?

A. The first information that I had received is not contained in this log, but was phoned to me from the Vancouver Department of Transport, who at that time we had a direct phone, and who also worked our flights when they were unable to work the CAA stations.

Q. Do you recall approximately what time that message was received?

A. To the best of my knowledge—I will have to refer to the message I sent to Anchorage advising them of the time that the ship had reported crashed at Sandspit, and I would do so within a minute after receiving the call, or I would direct someone to do it.

Q. Would you refer to that message? I believe it is fifth from the bottom of page 2, Exhibit A-5.

A. This is the message I sent to Anchorage, and that is filed at 2:55 A.M. Seattle time, stating that "324 of the 17th reported crashed at Sandspit. Will advise later." Signed, Smith.

Q. Would you read the next to the last message from the bottom of page 2?

A. This message is directed to Anchorage and to Seattle Flight Control. It says: "MATS at El-

(Testimony of Charles E. Smith.)

mendorf very irate about lack of information on 324 of the 17th." The next letters, [468] 342, I believe that is a duplication or transmission error in there. It further states: "Please advise any available" and then I assume "information," which is the word is missing. Signed, Barry, Anchorage Flight Control.

Q. What time in Pacific Standard time did you receive that transmission?

A. I received that transmission—did you say Seattle or Anchorage?

Q. Seattle, please.

A. 3:50 A.M. Seattle time. Correction, that message was filed at 3:50 A.M. Seattle time, but I have no record here of what time it was received.

Q. Can you estimate the amount of delay in transmission that would have been occasioned?

A. No, I cannot.

Q. Did you transmit or exchange any additional information that is not disclosed in these transmissions with either Anchorage Flight Control or Flight 324 between the time Northwest Airlines Flight 324 reported its engine out and the time it was reported crashed other than that which you have already testified to?

A. I do not recall any other information.

Q. Were you advised as to any findings of the Civil Aeronautics Board concerning the fact that Sea and Air Rescue Facilities were not alerted until after the accident [469] because three-engine

(Testimony of Charles E. Smith.)

operations over water were considered a potential and not an actual emergency?

Mr. Koch: I object to that question. The reports of the Civil Aeronautics Board, so far as this witness is concerned, would be inadmissible, hearsay.

The Court: The objection is overruled.

The Witness: Would you state the question again?

The Court: Read the question.

(Last question read by reporter.)

A. I have read the Civil Aeronautics report, but I don't recall what it says.

Mr. Riley: I would like to show the witness what was previously marked at the pre-trial hearing by the Court as Plaintiffs' Exhibit 1, and is referred to in the pre-trial order, Paragraph 1, a copy of the accident investigation, of the Civil Aeronautics Board report. I will use this to refresh the recollection of the witness, if the Court please.

Mr. Koch: I object to the exhibit even being shown to the witness. I would like to be heard on the subject.

The Court: You may. What is the objection?

Mr. Koch: Your Honor, there is a Federal statute which expressly makes privileged and confidential the Civil Aeronautics Board report and the testimony taken by the Civil Aeronautics Board, and there is a series of [470] decisions construing the Act and preventing the use of the report in trial of lawsuits relating to accidents.

(Testimony of Charles E. Smith.)

The Court: Is it something similar to what used to be the state rule regarding an accident report in the Police Department?

Mr. Koch: No, your Honor. Well, it is similar, but this is more specific. This is an act relating strictly to the Civil Aeronautics Board.

The Court: Read the briefest possible part of the Act itself which says that.

Mr. Riley: While we are doing that, I will ask that this document which I have taken from the defendant's records be marked as the plaintiffs' next exhibit.

The Court: Is it a copy of what you previously referred to?

Mr. Riley: No, your Honor. This is a new document. I thought while counsel was looking for that, we would save time and have it marked. It comes from the documents in the possession of the court which were delivered the day of the trial.

The Court: The Court first marks at this time in connection with the present interrogation Plaintiffs' Exhibit 1 that was referred to and to which objection is now being made.

(Accident report marked Plaintiffs' Exhibit 1 for identification.) [471]

Mr. Koch: Title 49 USCA, Sec. 581, deals with the admissibility of Civil Aeronautics Board records and reports. It provides in part as follows: "No part of any report or reports of the former Air Safety Board or of the Civil Aeronautics Board relating to any accident or the investigation

(Testimony of Charles E. Smith.)

thereof shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." There have been cases construing the statute, and without exception, the Civil Aeronautics Board reports, the exact type of report which counsel is now offering, has been rejected.

Mr. Riley: I would like to be referred to some cases. There is a great deal of case law on this. I point out to the Court I am only using it to refresh the recollection of the witness at this time, and as an employee and flight superintendent for the airline.

The Court: The objection is sustained to the form of the question,——

Mr. Riley: Am I not permitted——

The Court: ——because the question does bring into this record, before this trier of the fact, what the report contains, the fact disclosed by the report.

Mr. Riley: Thank you, your Honor. I will rephrase it. The witness may be shown Plaintiffs' Exhibit 1.

The Court: That will be done. [472]

Mr. Koch: I object to the witness being shown the exhibit, because since his testimony with respect to it is not admissible, and the report is not admissible, he cannot be cross examined with respect to it. You see, your Honor, in order for this report to have any value—I mean, if it were a matter of impeaching——

The Court: The objection is sustained. I would

(Testimony of Charles E. Smith.)

like to see that statutory citation you were reading. 49 USCA 581?

Mr. Koch: Yes, your Honor.

The Court: Check what you have there, in the last half of the second paragraph: "and that no part of any report or reports of the former Air Safety Board or of the Civil Aeronautics Board relating to any accident or the investigation thereof shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." June 30, 1940, is the last time this shows an amendment. Is there any recent amendment of it? Have you checked it?

Mr. Koch: Yes, your Honor.

Mr. Riley: If your Honor please, in construing that statute, I would like to state for the record very briefly, so we can proceed, that this Act, as far as I am concerned, is one of the most unfair we run into, because ordinarily, in a crash like this, the only evidence you can possibly [473] get is material that the Civil Aeronautics Board uncovers, and to construe the Act to prohibit us even to use it to refresh the witness' recollection, an employee of the airline, in a substantial position, is very prejudicial and difficult. I am not offering it as an exhibit, I only want to refresh his recollection, and offer to show that the report—that it was a fact that search and rescue facilities were not alerted until after the accident.

The Court: "or used"—"shall not be admitted

(Testimony of Charles E. Smith.)

as evidence or used in any suit or action.” Aren’t you using it if you are trying to refresh his recollection?

Mr. Riley: Yes. I just feel that——

The Court: I believe the words are plain. I will have to have you show me under this statute that does not mean “using.”

Mr. Riley: All right, your Honor. I wish to offer Plaintiffs’ Exhibit 21 in evidence at this time and use it for a few more questions with Mr. Smith. I believe the relevancy is apparent on the face of it. It is taken from the business records of the defendant, delivered here on the first day of trial by Mr. Koch.

Mr. Koch: Your Honor, this is a letter, not an ordinary business record. The letter is signed by Mr. Cox, who is subpoenaed and in this courtroom at this time, and it would seem to me that the appropriate procedure is [474] to introduce this letter through Mr. Cox, and if so done, I would have no objection, but I object to the attempt to introduce this letter through a different witness who is not familiar with it, and in whose responsibility the subject matter of the letter does not fall, and therefore, since it is not a business record and not properly subject to admission into evidence, I object to it.

The Court: That objection is overruled. It is without prejudice to your objecting to the questions.

Q. I would like to have you refer to Page 3 of

(Testimony of Charles E. Smith.)

that letter marked Plaintiffs' Exhibit 21, Mr. Smith.

Mr. Koch: Your Honor, this has not been admitted in evidence, has it?

The Court: No. It has been marked for identification.

Mr. Riley: Pardon me, your Honor. I do offer it. I had understood your Honor to pass on the admissibility.

The Court: What is the authentication which you use to rely upon to support your offer?

Mr. Riley: The document is taken from the business records of the defendant delivered in court by counsel for defendant, and it is a letter relating to the duties of the flight superintendent in the event of an engine-out operation, which is the situation which existed on January 19, 1952. I wish to inquire further of Mr. Smith with respect to these policies as they were reported in [475] this letter from the business records of the defendant.

Mr. Koch: Your Honor, the rules are very well established on what qualifies under the business records statute for admissibility. It is records made in the regular course of business. This is a routine letter. I wouldn't call it a routine letter; it is a letter on a particular subject, not made in the regular course of business, made under very unusual circumstances, and it does not come within the exception to the hearsay rule under which business records made in the regular course of business may be admitted.

(Testimony of Charles E. Smith.)

(Further argument and discussion among counsel and Court.)

Mr. Riley: Since this was written by Mr. Cox, I can take care of it later and will pass to the next witness. I have no further questions of Mr. Smith.

Mr. Koch: That is agreeable.

Cross Examination

Q. (By Mr. Koch): Referring to Exhibit A-5, which is called the flight position log, Flight 324 of the 17th, will you explain what this air route traffic control actually is and under whose jurisdiction it falls?

A. The Airways Traffic Control is a Government agency regulating the flow of traffic. In other words, they keep [476] the different airplanes, the different airlines apart so they won't collide by assigning different altitudes and different approaches to the airport at their destination.

The Court: What agency, if you know, of the Government maintains this service?

The Witness: The Airways Traffic Control comes under the Civil Aeronautics Administration.

The Court: What is the classification of the person who is the spokesman from that authority to the plane operator, the pilot, carrying the words which command the pilot's course as to height and distance and direction?

The Witness: The man in the Airways Traffic Control is known as a traffic controller.

(Testimony of Charles E. Smith.)

The Court: Where is he located and from what point does he operate, if any?

The Witness: In this instance, Airways Traffic Control is established at Seattle and Anchorage.

The Court: Where? In what place, at what spot on the ground?

The Witness: It is at each airport.

The Court: Where was the one that was concerned with this flight, if any was concerned with this flight, spotted in Seattle with reference to airports, and in what type of structure, if any structure?

The Witness: The Airways Traffic Control at Anchorage [477] airport would assign the altitude for the flight to be——

The Court: The witness seems to the Court not to want to answer what the Court is inquiring.

Q. The Court is inquiring as to where the Airways Traffic Control is located in Seattle.

A. Airways Traffic Control is located at the airport at Seattle.

Q. What building?

A. In the Administration Building in Seattle.

Q. King County Administration Building?

A. No, the Seattle-Tacoma Airport Administration Building at the Seattle-Tacoma Airport.

Q. Does that facility serve all airlines that operate in and out of Seattle?

A. That is correct.

Q. Is there a comparable facility in Anchorage?

A. Yes.

(Testimony of Charles E. Smith.)

Q. Where is it located?

A. I do not know.

Q. Is it at the Elmendorf Airfield somewhere?

Mr. Riley: I object to the question. He said he didn't know.

The Court: I feel that under the circumstances, the further questioning by counsel is appropriate. This objection is overruled. This witness seems to the Court [478] to have an unnatural and wholly unexpected reluctance about testifying. I do not know why it is. If counsel can break through the barrier and get him to let the Court know what he would be expected to know about this, I am sure it would be of great service in the trial.

Mr. Koch: I think he misunderstood, your Honor.

Q. Can you tell us what you do know about the Airways Traffic Control office or place of business in Anchorage?

A. No, because that is not under my operational control. I can tell you about the performance of its functions in Seattle.

Q. Are there other centers between Seattle and Anchorage where this Air Traffic Control maintains facilities? A. Not to my knowledge, no.

Q. You have mentioned in your direct examination that messages were relayed from station to station. What kind of stations are they that relay such messages?

A. The traffic controller in the Airways Traffic Control will forward a message to the CAA radio

(Testimony of Charles E. Smith.)

station along the route to be transmitted to the flight.

Q. What CAA radio stations are there between Seattle and Anchorage?

A. There is Seattle, Annette Island, Yakutat, Sitka, Gustavus, Yakutat, Anchorage.

Q. Is Vancouver on a different relay or control system? [479]

A. Yes, Vancouver has an Airways Traffic Control located in Vancouver, I presume at the airport, and because our flights go through part of British Columbia, Vancouver would have certain control over those flights while they are in their area, and they use their Department of Transport of Canada, which is comparable to the CAA radio of this country.

Q. Is there a British Columbia or Department of Transport Traffic Control center at Sandspit?

A. No.

Q. Is there a radio station at Sandspit?

A. Yes.

Q. Do all aircraft of all companies operating between Anchorage and Seattle or portions of that general route use the facilities of this British Columbia and CAA radio system?

A. At the time, they all used the facilities of the CAA, and if they wanted to use the facilities of the Department of Transport, they could.

Q. Then these messages that appear on Exhibit A-5 are all messages that are transmitted through the Civil Aeronautics Administration Traffic Con-

(Testimony of Charles E. Smith.)

trol, relayed from station to station, is that correct?

A. Yes, mostly correct, except Sandspit comes under the Department of Transport of Canada, and there is a message [480] from Sandspit. However, that was relayed through the Annette station.

Q. Was there any direct communication made or possible to have been made between Seattle and the flight directly?

A. I do not know. I do not believe so, because we had to use this method of relay due to atmospheric conditions and the particular setup. It was the best that we could utilize at that time.

Q. Was that provided for by regulations of Northwest Airlines, that they would use the Civil Aeronautics Administration radio system?

A. Yes.

Q. And would your answer hold true of communications between Anchorage and the flight?

A. Yes, that would be a similar situation.

Q. Then as the plane proceeded from Anchorage to Seattle there might be log messages between stations along the route and the flight, might there not?

Mr. Riley: I object. He is leading the witness. If I can't lead him, he shouldn't be permitted to.

The Court: Sustained.

Q. Will you tell me if under ordinary circumstances there can be log messages between the flight and the CAA radio stations?

A. Would you clarify that question again?

(Testimony of Charles E. Smith.)

Mr. Koch: I will strike the question. [481]

Q. Could the flight have communicated directly with Annette when it was in the vicinity of Annette Island? A. Yes.

Q. Could the flight have communicated directly with Sandspit when it was within Sandspit radio range? A. Yes.

Q. How about between the flight and Vancouver?

A. Possibly, but inasmuch as it could contact the Sandspit station, that would be relayed to Vancouver, and they would normally contact the closest station.

Q. Under those circumstances, would such direct contacts as might take place between the flight and one of these stations then be relayed to Anchorage or to Seattle? A. Yes.

Q. Are these stations provided with directions with respect to where to transmit messages, whether a message shall go to Seattle or to Anchorage or to way points?

Mr. Riley: I object to that. I don't think he is qualified. I think it isn't the best evidence. He should ask the people who would know the CAA regulations.

The Court: If you know. The objection is overruled.

A. I do not know.

Q. I notice on Exhibit A-5, the flight position log, flight report, that there are delays between the transmission of messages and the receipt of

(Testimony of Charles E. Smith.)

those messages at the point of [482] destination. Messages between the flight and receipt in Seattle sometimes took an interval of time. Can you explain that?

A. Well, we used the Civil Aeronautics Administration radio facilities, and there is—there can be a lag in time on the messages due to the CAA radio operator being busy with other airline flights forwarding reports and the other duties he has at the station, and also the fact that the circuit might temporarily—he might have to wait his turn to relay the report.

Q. Were the delays that are apparent on Exhibit A-5—do you have it before you now?

A. Yes.

Q. How do they compare with normal transmission delays at that time?

Mr. Riley: I object. He hasn't shown that there were any delays.

Mr. Koch: He just answered it in the last question.

The Court: The objection is overruled.

A. I do not recall in this instance whether there were any delays or not in the transmission, but indicates there was no abnormal delays, because I don't recall of trying to have to go after the information when I didn't receive the answer.

Q. This is about the way it usually is? [483]

A. Yes.

Q. Mr. Smith, will you explain how a flight is—talking about the Anchorage to Seattle flight, Flight

(Testimony of Charles E. Smith.)

324 of the 17th, how was that flight released from Anchorage? A. Well, the——

Mr. Riley: If the Court please, I would like to make one statement for the record here. It seems to me counsel is going to go pretty far afield from the direct examination. I want to know whether or not counsel's examination is going to impede on the time I am going to be permitted to present my part of the case.

Mr. Koch: Your Honor, this exhibit starts with the first message from the flight, and I am only trying to make the exhibit meaningful so that the Court will appreciate——

The Court: I do not think you should use any more time in cross examination of this witness. You can call him as your witness as part of your case in chief.

Mr. Koch: Your Honor, would I be permitted to complete this one question?

The Court: You may.

A. In the operation of an Anchorage-Seattle flight, the flight superintendent in Anchorage would check the weather over the route, and I in Seattle would check the weather over my part of the route, and if I were convinced the flight [484] could be flown in safety, I would send him what is known as a release. In other words, a release means that I will accept the flight in my area, that the weather and facilities are O.K. for the flight in my area. When the Anchorage flight superintendent receives that and he agrees that the conditions are suitable

(Testimony of Charles E. Smith.)

in his area, he discusses the operation with the captain and the captain accepts the release, based on his thinking and analysis of the weather also, which, in short, means that three people are involved in the release of the flight: the flight dispatcher at Anchorage, the Seattle flight dispatcher, and the captain of the flight.

Q. Did that take place in this particular flight when it departed from Anchorage?

A. That is the normal procedure, yes.

Q. Was it carried out in this case?

A. Yes, I sent a release to Anchorage, and the flight being released would indicate that conditions were suitable in the Anchorage area.

Mr. Koch: Your Honor, my own thought on the matter is that if I were to complete what I think now would be a very short cross examination, that it wouldn't be necessary to recall this witness, but if the Court—

The Court: Please make it as brief as possible, and stay closely within the limits of the direct.

Q. Referring to Exhibit A-5 again, Mr. Smith, and the first message received in Seattle advising that the No. 1 engine is feathered and that the pilot was proceeding to Sandspit—do you find that one, the fourth message from the bottom of the page—you sent the following message, did you not?

A. Yes.

Q. And you wished to be advised about landing at Sandspit?

A. Yes. I assumed that the flight was going

(Testimony of Charles E. Smith.)

to land at Sandspit. That is the normal procedure, from the interpretation of the message I had. However, I wanted to give the flight the information that if he didn't find things suitable there, that the Seattle weather was all right for him to continue on, but that was his decision to make. I was merely assisting.

Q. Did you receive a subsequent message bearing out your assumptions with respect to the pilot's intentions?

A. I received a message that the flight was estimating over Sandspit, and the time——

The Court: Couldn't you answer that yes or no?

A. Yes.

Q. Is that message third from the top on the second page? A. Yes.

Q. Did you receive a message from the flight, relayed from the flight, with reference to the cause of failure of the [486] No. 1 engine?

A. Yes, I recall that I did.

Q. Did you notice where that message is on the exhibit?

A. It is on page 1, second from the bottom.

Q. What was the cause?

A. "Northwest 324 oil cooler No. 1 engine broken proceeding to Sandspit. Signed NWA Pfaffinger."

Q. Who was Pfaffinger?

A. That was the captain of the flight.

The Court: Was he in charge of the operation

(Testimony of Charles E. Smith.)

of the plane from a position in the cockpit of the plane?

The Witness: Yes.

The Court: He was the pilot, is that right?

The Witness: Yes.

Mr. Koch: May I see Plaintiffs' Exhibit 6?

Q. Do you recall the red pencil marks you made showing the course of the flight from Anchorage to Sandspit?

A. Yes. That was a flight plane route.

Q. Pardon me?

A. That was a flight plane route in accordance with this Exhibit 5.

Q. Is that Amber 1 you refer to in identifying the first message on A-5, the flight position log—

A. A-1 means Amber 1, yes.

Q. And that red line that you marked is Amber 1? [487]

A. Part of it is, yes.

Q. Does that route have any military designation?

A. It was known at that time as a military route.

Q. Do you know whether that is what the flight plan for this flight called for?

A. Yes.

Mr. Koch: I have no further questions.

Redirect Examination

Q. (By Mr. Riley): This Amber 1 and the Sandspit route you said was also known as a military route was the ordinary course for all commer-

(Testimony of Charles E. Smith.)

cial flights between Anchorage and Seattle, isn't that right?

A. For most of them, non-stop flights, yes, sir.

Q. You stated that the three individuals, the captain of the flight, the Anchorage flight controller and yourself, determined the release of the flight. Is the anchorage flight controller also an employee of Northwest Airlines?

A. Yes, he is in the same capacity as I am. He is stationed in Anchorage.

Q. Sandspit is a facility that you would check as in your area before issuing your release for this flight to proceed, is that correct? Did I understand your testimony?

A. Yes, we would check Sandspit.

Q. Did you check Sandspit on that night? [488]

A. As I recall. It was part of my routine duties.

Q. Do you know what safety facilities were at Sandspit on January 19, 1952?

The Court: For use with reference to what kind of operation?

Q. Do you know what type of safety facilities were located at the Sandspit airfield for use of incoming flights or flights originating or departing from or landing at Sandspit?

A. I knew them, but I don't know, don't remember them now.

Q. You haven't any idea what facilities were available?

(Testimony of Charles E. Smith.)

A. I wouldn't like to commit myself when I don't know.

Q. Just to clarify one point as to the function of Air Traffic Control. Is it or isn't it fair, if you know, to say that the sole function of Air Traffic Control as it is operated by the Civil Aeronautics Administration is solely to give weather information and to receive and transmit communications and to provide safety separations for the aircraft in the air?

A. The Air Traffic Control merely controls the traffic in the area. They are the traffic policemen of the airways.

Q. In other words, all they do is provide separation as to altitude and distance between aircraft, is that correct?

A. That is correct.

Q. They don't have control over the destination of an aircraft?

A. No. [489]

Q. What priority would be given an aircraft in distress with an engine out? Would the airways be cleared for that aircraft by ATC?

Mr. Koch: If you know.

Q. If you know.

A. Not unless the captain requested.

Q. But if you or the captain requested it, the airways would be cleared for that aircraft to any destination that you or the captain selected, isn't that correct?

Mr. Koch: I object to the form of the question. He answered it in terms; perhaps, if the captain requested it. Now the question is "if you or the

(Testimony of Charles E. Smith.)

captain requested it." I think the witness is being misled by the question.

The Court: The witness is such an intelligent witness, the objection is overruled.

Mr. Riley: Read the question, please.

(Last question read by reporter.)

A. Yes, that is correct. A priority would be given to the aircraft either by my request or the captain's request.

Q. Did you request any priority? A. No.

Q. Did the captain request any?

The Court: To your knowledge.

A. I do not know.

Mr. Riley: I have no further questions. [490]

(Accident report marked Defendant's Exhibit A-18 for identification.)

(Brief discussion between counsel re A-18.)

Recross Examination

Q. (By Mr. Koch): Will you identify the exhibit which has been marked A-18? A. Yes.

Q. Will you give me the name of it and the date? What is the name of the document? Does it have a title?

A. This is an accident report of Flight 324 of the 17th.

Q. And does it bear your signature? A. Yes.

Q. Is the date of the report shown?

A. Yes.

Q. What date does it bear?

(Testimony of Charles E. Smith.)

A. January 20, 1952.

Q. Do regulations of the company and of the Civil Aeronautics Administration require that such report be submitted following an accident?

A. Yes.

Mr. Koch: I offer the report in evidence, your Honor.

Mr. Riley: I have no objection, your Honor.

The Court: Admitted.

(Defendant's Exhibit A-18 for identification received in evidence.) [491]

The Court: Is there anything else?

Mr. Koch: That is all, your Honor.

Mr. Riley: No further questions.

The Court: Step down.

(The witness was excused.)

(Brief discussion between counsel re A-18.)

Mr. Koch: Mr. Smith, were you assigned to investigate the crash of this flight?

The Witness: No.

Mr. Koch: Did you go to Sandspit?

The Witness: No.

Mr. Koch: Have you ever investigated an accident?

The Witness: No.

Mr. Koch: Is this made in your capacity as flight superintendent at the time of the accident?

The Witness: Yes.

The Court: Proceed. Call the next witness. [492]

EDWARD R. MATTHEWS

called as a witness by plaintiffs, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Riley): Would you state your name for the record? A. Edward R. Matthews.

Q. Where do you reside?

A. 10847 Rustic Road.

Q. Where are you employed?

A. Northwest Airlines.

Q. How long have you been employed at Northwest Airlines?

A. Approximately nineteen years.

Q. In what capacity are you presently employed? A. Chief mechanic.

Q. For what region or area of Northwest Airlines? A. Seattle, Washington.

Q. How long have you held that position?

A. Approximately eleven years.

Q. Were you so employed and did you hold the same position in January of 1952? A. I did.

Q. In your nineteen years with Northwest Airlines, have you always been employed as a mechanic? [493]

A. In the maintenance department, yes.

Q. Are there Civil Aeronautics Regulations and other qualifications which you must meet to qualify as a mechanic for a scheduled airline?

A. There are requirements, yes, but we do have mechanics that do not have to pass these examinations.

(Testimony of Edward R. Matthews.)

Q. Are you certificated by them?

A. I am.

Q. What is your qualification or how are you licensed by the Civil Aeronautics Administration? In what capacity are you licensed by the Civil Aeronautics Administration?

A. Aircraft and engine mechanic.

Q. How long have you been so licensed?

A. One license since I was eighteen years old, and the other one since I was twenty.

Q. Are you familiar with the procedures used by Northwest for compiling engine time and aircraft time?

A. No, I am not.

Q. Have you any idea at all as to how the records are compiled and kept with relation to the particular aircraft?

A. A rough—I am not fully informed as to the full details of how they are. I have a rough idea how they are maintained.

Q. Would you describe in general how the records are kept?

A. The records are maintained in St. Paul. All we do is [494] forward the information to them.

Q. What information do you forward to them?

A. All records of maintenance is forwarded. Practically every job we accomplish, there has to be a record made of it, and those records are all forwarded. Everything on the aircraft that we maintain or do is sent to St. Paul for records.

Q. The records that you compile, or they are compiled by the pilot?

(Testimony of Edward R. Matthews.)

A. The records are compiled by the pilot as a logbook on the airplane. All our maintenance records are forwarded, and the logsheets the pilots compile are also forwarded.

(Maintenance records marked Plaintiffs' Exhibit 22 for identification.)

Mr. Riley: I cite to the Court that those are withdrawn from counsel table, from the records that have been previously produced here.

The Court: You mean counsel table here in the courtroom, is that what you mean?

Mr. Riley: Yes, Your Honor.

Q. Do you know that records are kept regularly by the airline of each engine on each aircraft?

A. Yes, to my knowledge they are.

The Court: What kind of records, maintenance records?

The Witness: Yes, sir. Time records on [495] all aircraft engines, propellers or component units.

The Court: What do you mean by "time"?

The Witness: The amount of time the units are run.

The Court: In other words, the number of hours or substantial fractions thereof an engine has been operating in flight?

The Witness: That is right.

The Court: Is included in the records you mentioned?

The Witness: That is right.

(Pilot's logs, Ship #601, marked Plaintiffs' Exhibit 23 for identification.)

(Testimony of Edward R. Matthews.)

Q. Mr. Matthews, would you refer to the file that you have there before you, and if you can, tell us what the records would indicate, what the file would indicate——

Mr. Koch: I think there should be some identification first. Find out whether these records were made in Seattle or whether this witness knows anything about them.

Mr. Riley: He just stated records are kept by the company.

The Court: Did he say these are among those, that this exhibit is among those so kept?

Mr. Riley: He has not as yet.

The Court: I think it is proper to give him an opportunity to identify it more particularly.

Q. Referring to Plaintiffs' Exhibit 21, the file you have [496] before you, do you know what those records are?

A. They are records of spark plugs and they are engine maintenance records.

Q. Do the records and the documents before you have reference to specific engine numbers and to specific aircraft?

A. Yes, they do.

Q. To what aircraft do those records refer?

A. This record of this file is ship 601.

Q. And you are referring to what has been marked Plaintiffs' Exhibit 21, is that correct?

A. This is Plaintiffs' Exhibit 22.

Q. Would you refer to the last——

Mr. Riley: I believe that is sufficiently identified, Your Honor. I will ask Plaintiffs' Exhibit 22 be

(Testimony of Edward R. Matthews.)

admitted in evidence as part of Plaintiffs' case.

Mr. Koch: I object, Your Honor. This witness did not make the records. They were made in St. Paul. He doesn't know anything about these records any more than you or I do.

The Court: The objection is overruled. Plaintiffs' Exhibit 22 is admitted.

(Plaintiffs' Exhibit 22 for identification received in evidence.)

The Court: You have not made any offer of 23?

Mr. Riley: Not yet, Your Honor. [497]

Q. Would you refer to the last card contained in the file before you, Plaintiffs' Exhibit 22, and I will ask you to indicate the serial number, if you are able to tell from those records, of the No. 1 engine on ship 601, according to the records before you?

A. It states here the No. 1 engine on this card is 701355.

Q. Would you state, if you are able, the total amount of time since overhaul on the No. 1 engine, is indicated by the record before you?

A. I am not too familiar with this, but there is TSO's on here. I can just read what I see.

The Court: Don't read what you see. You are not asked to do that.

Does the record indicate the time since overhaul on the No. 1 engine of the aircraft as of January 19, 1952?

A. I'm really not sure just how to interpret

(Testimony of Edward R. Matthews.)

some of these things on here. There's spark plug information, engine data, propeller data, all thrown together. I'm not sure of this form, to be sure of my statement.

Q. Do you know what the total permissible time since overhaul is on engines installed in DC-4's in January of 1952?

A. No, I would hesitate to say without checking the records.

Q. You were aware and informed of the fact after the crash of Flight 324 that the No. 1 engine had been operated in excess of the maximum permissible time since overhaul, [498] were you not?

Mr. Koch: I object to the question as leading and suggestive.

The Court: "Are you"? Is that the form of the question?

Mr. Riley: I asked, "were you".

The Court: That objection is overruled.

A. No, I was never informed that it was.

Q. Do you recall a deposition taken at the Northwest Airlines office at the Seattle-Tacoma Airport, you and Mr. Peterson, Mr. Opsahl, myself, Mr. Payne Karr were present? A. Right.

Q. Did you or did you not state at that time that you were informed that the engine had been operated in excess of the maximum time since overhaul?

A. I did, but I misinterpreted your question as knowing soon after the accident. I was unaware of it

(Testimony of Edward R. Matthews.)

until several years afterwards, that the engine was overtime.

Q. But you did become subsequently apprised of the fact that the engine had been operated beyond the maximum time permitted? A. Yes.

Q. Do you know approximately how much the engine had been operated in excess of Civil Aeronautics Regulations on the subject? [499]

Mr. Koch: I think there are rules against impeaching your own witness.

The Court: The objection is overruled as applied to this question. Answer yes or no.

A. How many hours?

Q. Yes. A. Approximately.

Q. Would you state approximately how much it was?

A. From my understanding, it was in the neighborhood of 100 to 150 hours.

Q. Referring once again to the last page of Plaintiffs' Exhibit 22, did the last entry in there indicate the last recorded time and the total time since overhaul, according to the latest records of defendant Airlines, insofar as you are able to tell?

A. So far as I am able to tell, I would assume that was the last entry.

Mr. Riley: I am not certain of the procedure in this matter. I would like to direct the Court's attention specifically to this card and the entry, and since this document is now in evidence, and the nota-

(Testimony of Edward R. Matthews.)

tions made on the card, the statement is: Crashed at Sandpit, Queen Charlotte Island, while attempting emergency landing with No. 1 engine feathered due to broken oil cooler line. My copy is a little obscured, and it shows time on [500] the No. 1 engine as being 1725 hours and 16 minutes. I would like to direct the Court's attention to that exhibit and that particular portion of the exhibit.

The Court: What column, what line?

Mr. Riley: The last lines of numerals, approximately the middle of the page.

The Court: There are three lines below that, with a written statement.

Mr. Riley: That was a portion of what I was directing Your Honor's attention to, and secondly, the total time on the No. 1 engine, under the letters "TSO" in the column designated No. 1 engine.

The Court: No. 1 engine, is that the one?

Mr. Riley: No. 1 engine, 701355.

The Court: Does that "NR 1" mean No. 1?

The Witness: Yes, sir.

Q. Does that No. 701355 indicate the serial number of the engine installed in the No. 1 position?

A. Yes.

Q. Did the last entry there on the bottom of the column indicate the last entry showing the total time since overhaul?

A. I would assume so from the—the Record Division handled these cards. I would assume so.

Q. What does the abbreviation "TSO" mean?

(Testimony of Edward R. Matthews.)

A. Time since overhaul.

Q. Then would you state the significance of the last figure on the bottom of the column under No. 1 engine?

A. That should be the time since overhaul on that engine as recorded on this card.

Q. According to the last entry, is that correct?

A. Yes, sir.

The Court: Showing operation time?

The Witness: Yes, sir.

The Court: Since overhaul? How much does it show since overhaul operation time is?

The Witness: 1725 hours and 16 minutes.

Q. What does the term at the top of the column mean which states "Max 1500", if you know?

A. I would assume that that was the maximum amount of hours at this time card was being used.

Q. What do you mean, maximum? The maximum permitted?

A. The maximum allowable hours before overhaul.

Q. When you say "maximum allowable before overhaul", allowable by whom?

A. Civil Aeronautics Administration.

Q. Does the Civil Aeronautics Administration promulgate regulations which fix the maximum permissible time?

A. That is right. [502]

(Photographs marked Plaintiffs' Exhibits 24 and 25 for identification.)

Q. Showing you what has been marked as Plain-

(Testimony of Edward R. Matthews.)

tiffs' Exhibit 24 for identification, can you describe the type of aircraft there?

A. This is a DC-4 Douglas. It is a Navy or Army version of it, I don't know which.

Q. Would you indicate which engine is the No. 1 engine? A. It is the one on the left outboard.

The Court: On your right, looking at the picture?

The Witness: It is the one on the right, looking at the picture.

Q. Would you mark that with an X as the No. 1 engine? A. Yes.

Mr. Riley: I wish to offer Plaintiffs' Exhibit 24 in evidence simply as something demonstrative, to help us make the point which we are about to try to make, just showing general configuration, exterior configuration, of a DC-4 type aircraft.

Mr. Koch: No objection.

The Court: Let the record show the offer made upon the condition stated, and there being no objection to the same, that exhibit 24, Plaintiffs', being a head-on view of four aircraft engines mounted on an airplane, is now admitted for illustrative purposes. [503]

(Plaintiffs' Exhibit 24 for identification received in evidence.)

Mr. Riley: He has identified it as a DC-4 type aircraft, Your Honor.

The Court: It is a four-motored plane, is it not?

Mr. Riley: Yes, Your Honor.

(Testimony of Edward R. Matthews.)

Q. Did you state what type of aircraft this was?

A. DC-4, Douglas.

The Court: Does the 4 refer to number of engines, or what?

The Witness: No, sir. That is a factory designation.

The Court: What distinguishes a DC with four engines and a DC with less than four?

The Witness: It is a series of airplanes that the manufacturer puts out.

Q. Referring to Plaintiffs' Exhibit 25 for identification, what type of aircraft was ship 601, which was used in Flight 324 on January 19, 1952?

A. It was a DC-4.

Q. The same type ship as shown in 24, is that right?

A. I can't say that. I don't know if this is a cargo or passenger version here. It is basically the same type.

Q. The engines are mounted the same?

A. The basic aircraft is the same.

Q. Same wing, same frame?

A. Same basic airplane, that's right.

The Court: Those connected with this case [504] are excused until 9:30 tomorrow morning.

(The court was adjourned.)

The Court: All are present. You may proceed.

Mr. Riley: May it please the Court, the plaintiffs would like to interrupt the testimony of Mr. Matthews to present Mr. Lewis, a pilot who has to

to be in Bellingham this afternoon, who will testify briefly on behalf of plaintiffs.

The Court: Have you any objection to withdrawing the witness for that purpose?

Mr. Koch: No.

The Court: The witness on the stand at the close of yesterday's session is withdrawn temporarily.

(The witness was withdrawn temporarily.)

ROBERT M. LEWIS

called as a witness by plaintiffs, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Riley): Would you state your full name for the record, please?

A. Robert M. Lewis.

Q. Where do you reside?

A. Mercer Island.

Q. Have you had any experience in flying? [505]

A. About 6,000 hours.

Q. Would you describe, in general, your flight experience?

A. Navy training, co-pilot for Pan American for about six months. During the entire World War II, I was flying Naval Air Transport Service, passenger, cargo and what not.

Q. Have you engaged in passenger flights as pilot of aircraft in over water flights?

A. Considerably.

Q. Approximately how many hours of that type flying?

(Testimony of Robert M. Lewis.)

A. In excess of 2,000 hours, I imagine.

Q. Do you have experience in DC-4 type aircraft? A. Approximately 3,000 hours.

Q. Have you had experience in weather flying?

A. Considerable.

Q. Do you still fly? A. Yes, sir.

Q. Approximately how much?

A. About forty or fifty hours a month.

Q. In your commercial transport pilot experience, over what route did you fly?

A. Practically all the world except Europe—South America, transcontinental, trans-Pacific, Alaska.

Q. In view of your experience, I will ask you whether or not you have an opinion as to whether or not in flying a DC-4 aircraft in over water operations, assuming that the [506] aircraft is flying from Anchorage to Seattle at an altitude of 10,000 feet and with forty passengers and a crew of three; and assuming that it becomes necessary approximately midway in the flight to feather the propeller of the No. 1 engine due to loss of oil: whether or not you have an opinion as to whether the crew should instruct the passengers in the use of life vests and life rafts and possible emergency landings?

Mr. Koch: Your Honor, I object to the question on the following grounds: first, that this witness has not been demonstrated to be an expert for the purposes of the question that has been asked. He may be a duly certificated and licensed pilot,

(Testimony of Robert M. Lewis.)

but whether or not—the question that is asked of him ignores the Civil Aeronautics Administration regulations, the company operating regulations, and he would have to be, if he were held by the Court to be an expert competent to express an opinion such as this, there would have to be considerably more limits to the hypothetical question that is asked in order that a proper answer be given.

The Court: The objection is overruled. You should answer yes or no.

The Witness: May I hear the question again?

(Last question read by reporter)

The Court: Answer yes or no as to whether you have [507] such an opinion. A. Yes.

Q. Would you state what your opinion is?

The Court: Do you wish to have the record show renewal of your objection?

Mr. Koch: Yes, I wish to renew my objection.

The Court: The objection is overruled. You may answer that, Mr. Lewis.

Q. Would you state what your opinion is, Mr. Lewis?

A. Well, if briefing is not conducted after take-off——

The Court: You have to take just what counsel stated in the question. You cannot consider anything else other than what counsel has said in his statement. Do you wish the question read again now?

The Witness: Please.

(Testimony of Robert M. Lewis.)

(Hypothetical question read by reporter)

A. Yes.

Q. Would you state what you feel should be done under the circumstances?

The Court: What his opinion is.

Mr. Riley: I would like to rephrase the question.

The Court: Do you want everything stricken?

Mr. Riley: No, Your Honor, I would like permission to rephrase it.

Q. Would you state your opinion as to what instructions should [508] be given, if any?

The Court: You may do that, and the objection to that is considered stated. Do you wish that?

Mr. Koch: Yes, Your Honor, I object to all these questions.

The Court: The Court will rule on the objection after you finally state the question. You may make the amendment you suggest.

Q. Would you state what, in your opinion, what instructions should be given to the passengers?

The Court: By whom?

Mr. Riley: By the crew of the aircraft.

The Court: Do you mean by the pilot to the crew, or by the crew to the passengers?

Mr. Riley: By the crew to the passengers.

The Court: You may do that. Mr. Koch, do you wish your objection to run to this question?

Mr. Koch: Yes, Your Honor.

The Court: The objections addressed to this ques-

(Testimony of Robert M. Lewis.)

tion are overruled. Will you now please state what that opinion is, as stated by counsel?

A. That they should be briefed in the use of Mae Wests and flotation gear aboard the aircraft.

Q. When do you feel that that briefing of passengers by the crew should take place under those circumstances? [509]

A. Immediately after takeoff; and if not done then, following the existence of emergency.

Q. In view of your experience in flying DC-4 type aircraft, would you consider that the loss of one of the engines in over water navigation, with a load of forty passengers; and assuming the same hypothetical question, with an aircraft down from Anchorage to Seattle, would you consider the loss of an engine to be an emergency situation?

Mr. Koch: I object to this question, too, your Honor. His opinion on whether the feathering of an engine—that should be answered only in terms of what the regulations and the law were at that time, and not what this witness' personal opinion as to the propriety or sufficiency of its loss may be.

The Court: The objection is overruled so far as the basis of the objection is concerned, but the Court will interpret the objection as including the form of the question, and that is sustained. You should not ask him to state only the affirmative of that question; you should ask him what his opinion is, if he has one, about whether or not something of that sort would be done, and what it is you are asking in your question.

(Testimony of Robert M. Lewis.)

Mr. Riley: Thank you, your Honor. I will strike the question.

Q. Would you state what your opinion is, if any, as to [510] whether or not the loss of an engine in a DC-4 type aircraft when flying over water between Anchorage and Seattle, using the hypothetical question previously stated, as to whether or not that would constitute an emergency situation?

A. Yes.

Q. In your opinion, do you feel that it is a sufficient emergency?

The Court: You should ask him what that opinion is.

Q. Would you state whether or not you have an opinion as to whether or not loss of an engine on a DC-4 type aircraft with a crew of three and forty passengers when en route from Anchorage to Seattle, flying over water, altitude of 10,000 feet, as to whether or not it is a sufficient emergency to warrant notification of Air-Sea Rescue facilities?

A. Yes, sir.

Mr. Koch: I object to that question, too.

The Court: Do you withdraw the other question you stated last before this one?

Mr. Riley: I intended to.

The Court: Notwithstanding the fact that he said yes, he had an opinion about the situation, you withdraw that question and state another one in the form last stated?

Mr. Riley: I asked him whether or not he had an

(Testimony of Robert M. Lewis.)

opinion as to whether or not this would constitute an [511] emergency situation.

The Court: And he answered "Yes," and didn't give his opinion.

Mr. Riley: I wish to ask him what his opinion is.

The Court: Strike the last question. The reporter had better read to the witness the question stated before, to which he made the answer "Yes."

(Question read by reporter as follows:

Would you state what your opinion is, if any, as to whether or not the loss of an engine in a DC-4 type aircraft when flying over water between Anchorage and Seattle, using the hypothetical question previously stated, as to whether or not that would constitute an emergency situation?)

The Court: You wish to ask him what that opinion is, as I understand it.

Mr. Riley: I would like to proceed further as to whether or not it was a sufficient emergency to——

The Court: You may proceed. His opinion has not yet been asked for.

Q. Would you state whether or not, in your opinion, it is an emergency?

The Court: The logical thing to do, if you wish to have the record show his opinion, is to ask him what that opinion is. [512]

Q. Would you state what your opinion is?

A. Of the emergency condition?

Q. Yes.

(Testimony of Robert M. Lewis.)

A. My answer was yes to that, and you want to know my opinion why it is an emergency?

The Court: We want to know your opinion on that question.

A. My opinion to that is that if the No. 1 engine was lost and the——

The Court: You had better not state any ifs and ands in your answer. State what your opinion is on the ifs and ands already stated.

A. My opinion is that the loss of an engine is always considered an emergency.

The Court: In that connection, what do you mean by loss of an engine?

The Witness: Where an engine must be feathered, referred to as feathered or secured, where the propeller is no longer turning.

Q. Would you state what your opinion is, if any, as to whether or not Air Sea Rescue facilities should be advised in the event of the feathering of an engine on an aircraft, a DC-4 type aircraft, in an over water flight between Anchorage and Seattle, with a crew of three and forty passengers?

Mr. Koch: Again the form of the question isn't as the Court has requested, as to whether he has an opinion on that question.

The Court: Mr. Riley, will you let the record show very clearly that you are first asking if on a certain state of facts he has an opinion, and then if he answers with an appropriate answer, then it is appropriate for you to ask him what that opinion is.

Mr. Riley: Thank you, your Honor.

(Testimony of Robert M. Lewis.)

Q. Mr. Lewis, will you state whether or not you have an opinion as to whether or not the loss of an engine in a DC-4 type aircraft when flying over water between Anchorage and Seattle with a crew of three and forty passengers is such an emergency as to require notification of Air Sea Rescue facilities?

Mr. Koch: I object to that, because I don't know—notification by whom, and to whom?

The Court: The objection is overruled.

A. I definitely think Air Sea Rescue should be advised.

(Approach plate marked Plaintiffs' Exhibit 26 for identification.)

Q. Showing you what has been marked as Plaintiffs' Exhibit 26, Mr. Lewis, can you state what that exhibit is?

A. It is a low frequency radio approach plate for Sandspit radio. [514]

Q. What is meant by the term "approach plate"?

A. It is a plate used by a pilot to make an instrument approach to a particular field. It indicates the magnetic bearings of the beams at that particular radio range station and the location of the field in reference to the radio range station.

The Court: What is that thing which you now hold in your hand and which has been marked Plaintiffs' Exhibit 26 for identification?

The Witness: It is a low frequency radio range approach plate, sir.

(Testimony of Robert M. Lewis.)

The Court: Do you mean it is a representation of it, a copy of something?

The Witness: It is a copy of an approach plate.

The Court: What do you mean by that term?

The Witness: It is a diagram of the area and the radio range station in reference to the field, and it is an instrument used by a pilot as a reference to make an instrument approach to that particular field.

Q. By whom are approach plates prepared?

A. They are prepared and approved by CAA.

The Court: It is a question of by whom was this one approved, if it was.

The Witness: This one was approved by the United States Air Force, used by MATS, Military Air Transport [515] Service, sir.

Q. These documents show the length of the runway?

A. Yes, there is a chart.

Mr. Koch: I object to any further testimony concerning the document itself other than identification of it.

The Court: That objection is overruled so far as anything other than the objection to the form of the question is concerned. Do you object to the form of the question?

Mr. Koch: No, your Honor.

The Court: The objection is overruled.

Q. Does it indicate the length of the runway of the field involved?

A. Yes, down in this corner it gives length and width and magnetic bearing.

(Testimony of Robert M. Lewis.)

The Court: You should answer yes or no.

Mr. Riley: I offer Plaintiffs' Exhibit 26 in evidence, if the Court please.

Mr. Koch: I object, your Honor. On the face of it, it shows that this exhibit was made April 5, 1956, which is something over four years after the accident. There is no testimony with respect to the changes in the field between the time of the accident and the present time, and it is highly prejudicial.

The Court: The objection is sustained. [516]

Mr. Riley: I have no further questions of Mr. Lewis.

Cross Examination

Q. (By Mr. Koch): What licenses, air pilot licenses, do you presently hold?

A. Civil Aeronautics Administration license, commercial.

Q. As commercial what?

A. Commercial pilot's license.

Q. How long have you held that license?

A. 1942.

Q. You testified that you were flying forty or fifty hours per month. By whom are you now employed?

A. I am self-employed, but I fly between forty and fifty hours a month for the Naval Reserve, ferrying aircraft and transporting personnel.

Q. You are flying for the Naval Reserve as a civilian on active duty from time to time?

A. Temporary additional duty.

Q. How long have you been so engaged?

(Testimony of Robert M. Lewis.)

A. Ever since the war.

Q. When did you last fly under your commercial license commercially-owned aircraft, regular airline aircraft?

A. I haven't flown commercial aircraft since 1942, when I flew Pan American.

Q. You flew with Pan American in 1942?

A. Co-pilot. [517]

Q. As a co-pilot for six months?

A. That's right.

Q. Over what run?

A. Miami - Rio de Janeiro.

Q. Have you ever landed at Sandspit?

A. I have never landed at Sandspit, no, sir.

The Court: Have you ever flown any air route between Anchorage and Seattle?

The Witness: Yes, sir, Naval Air Transport Service.

The Court: How long a time, if you recall?

The Witness: Between a year and a year and a half, and I have made several trips since then.

Q. When was that year to year and a half?

A. About 1942 into 1944.

The Court: What kind of work do you do now?

The Witness: I am in the commercial fish netting business, commercial fish netting supplier.

Q. Do you consider that it is your duty as a pilot to follow the instructions of the company or agency for which you are flying? A. Absolutely.

Q. Do you fly according to the Navy rules when you are flying Navy planes?

(Testimony of Robert M. Lewis.)

A. We fly according to Civil Air regulations.

Q. Would not the Navy perhaps impose even stricter regulations [518] than the Civil Aeronautics Administration regulations, under some circumstances?

A. There are certain circumstances not covered by CAA that they cover; otherwise, I would say no.

Q. Would you observe the Navy flying regulations in those respects? A. That's right.

Q. If you were flying for Northwest Airlines, would you fly in accordance with the CAA rules and regulations? A. Certainly.

Q. And in accordance with your company manuals? A. That's right.

Q. And if those manuals and CAA regulations classified emergencies under the category of actual emergencies and potential emergencies, and if they classified feathering an engine in flight as a potential emergency, would you act in accordance with the rules laid out for potential emergencies?

A. Yes, sir.

Q. If you were flying for a company under the circumstances where the Military Air Transport Service already gave the passengers briefing in the use of life vests and other emergency gear, and if your company also gave instructions with respect to that emergency gear at the time the flight got underway, would you then consider it necessary if an [519] engine were feathered in flight to give further instructions to the passengers respecting the emergency gear?

(Testimony of Robert M. Lewis.)

Mr. Riley: I am going to object unless Mr. Koch wants to offer to prove that these people were so instructed by the military, because he has stated in his hypothetical question that supposition, that they were instructed by the military.

The Court: The defendant has not begun his case in chief yet. The objection is overruled.

A. I wouldn't feel it necessary to further brief them.

Q. When you testified that the loss of an engine is always considered an emergency, were you distinguishing between various classifications of emergencies?

The Court: Such as what?

Q. Such as an actual emergency and a potential emergency.

A. It is a potential emergency.

Q. You consider it a potential emergency, rather than an unqualified emergency?

A. Well, it isn't an emergency at the time you feather the engine as long as you are holding altitude and air speed.

Q. It is only a potential emergency at that time?

A. That's right. In case of a wave-off at an airport or something——

Q. You testified that in your opinion Air Sea Rescue facilities should have been alerted in the event of an [520] emergency. Did you again mean an actual emergency, as distinguished from a potential emergency?

A. My statement there was that if there was an

(Testimony of Robert M. Lewis.)

aircraft en route with one engine out, Air Sea Rescue should be advised of his position, destination and its route.

Q. Of its position, destination and route?

A. That's right, which would be controlled by ATC.

Q. Would you consider that the crew had complied with this notification by giving notice to the air route traffic control center?

A. That's all that is necessary, is to call the closest radio range station and report your existing emergency or potential emergency.

Q. Would further alerting of Air Sea Rescue be done by the air route control radio center?

A. Yes, that and the dispatcher.

Q. I can't hear you.

A. The CAA radio communications and control, such as ATC, and the airline dispatcher, if he had gotten the word on it, which he naturally would.

Q. It wouldn't be the crew's duty to actually notify the Air Sea Rescue facility directly?

A. They can't.

Q. I beg your pardon?

A. In my opinion, they cannot directly notify Air Sea Rescue. [521] It is the ground facilities' responsibility.

Mr. Koch: I have no further questions.

Mr. Riley: I have no further questions, your Honor.

The Court: This witness is excused from the stand and may now retire.

(The witness was excused.)

(Discussion re calling other witnesses and further interrupting Mr. Matthews' testimony.)

The Court: You may call the other witnesses. Mr. Matthews' testimony is further interrupted.

FRANK B. KAVANAUGH

called as a witness by the plaintiffs, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Riley): Would you state your full name, please? A. Frank B. Kavanaugh.

Q. Where do you live?

A. Auburn, Washington.

Q. Where are you employed?

A. Northwest Airlines, Bow Lake.

Q. What is your capacity there?

A. Mechanical foreman. [522]

Q. How long have you been so employed?

A. At Bow Lake, about six years continuous now in that capacity.

Q. Were you so employed and working there about January 19, 1952? A. Yes, sir.

Q. Would you describe in detail your duties as mechanical foreman?

A. I have the over-all general supervision of the mechanical department at the hangar there during the shift.

Q. Were you in January, 1952 responsible for installation on board the aircraft of the defendant company of life rafts? A. Yes, sir.

(Testimony of Frank B. Kavanaugh.)

Q. What were your responsibilities with respect to life rafts?

A. I was supervisor of the mechanics that did that type of work.

Q. Do you know or do you recall whether or not life rafts were installed in ship 601, which was Northwest Airlines Flight 324, January 19, 1952, prior to the time it departed for Japan from Seattle for that flight?

A. All I can say is they should have been.

Q. Were you personally responsible for the installation of the life rafts in each of the aircraft operating here at Seattle?

A. If they departed on my shift, I would say so.

Q. If they departed on another shift, whose responsibility [523] would it have been?

A. It was generally the responsibility of the inspection department to see that they were properly stowed. The mechanics installed them.

Q. What person or what individual at Northwest Airlines operations base at Seattle-Tacoma Airport in January, 1952—let's say specifically on or about January 19, 1952—would have been responsible for the proper placement of life rafts aboard the aircraft?

A. It would be the mechanic assigned to the job by his crew chief.

A. Are these rafts removed before and after each flight?

(Testimony of Frank B. Kavanaugh.)

A. No, sir, not necessarily. On those aircraft, they were not.

Q. When you say "on those aircraft," to what aircraft do you refer?

A. Aircraft that operate overseas, or aircraft operating overseas maybe one trip.

Q. If they are not then removed, then you don't have the responsibility for installing the rafts, is that right?

Mr. Koch: I object to the form of the question.

The Court: The objection is overruled.

A. They are checked each flight.

Q. Do you check them?

A. No, sir, I do not. I might spot check them.

Q. Who has the responsibility for checking the rafts? [524] A. Inspection.

Q. Who on January 19, 1952, would have been charged with that responsibility? Who was head of the department responsible for checking them?

A. Maintenance department.

Q. What individual or person in the maintenance department?

A. It would be the mechanic assigned to the job by the crew chief, running the maintenance check on the particular aircraft.

Q. And in January, 1952, to whom would the mechanic assigned by the crew chief report?

A. To the crew chief.

Q. And to whom does the crew chief report, or to whom is the crew chief responsible?

A. The foreman.

(Testimony of Frank B. Kavanaugh.)

Q. What foreman?

A. The foreman of the shift.

Q. Are reports of these inspections made by your mechanics?

A. They are signed for on a card.

The Court: What is your answer, yes or no?

The Witness: Yes.

Q. Are the reports in writing or are they oral?

A. They are in writing.

Q. Does anyone at the Northwest Airlines base and did anyone in January, 1952 have the duty of checking these written [525] reports?

A. The check forms are assembled by the crew chief.

The Court: Answer yes or no.

The Witness: Yes.

Q. Do you know Mr. Pitcher? A. Yes, sir.

Q. Is he responsible for any of these functions?

A. I don't believe so.

Q. Do you know Mr. Opsahl? A. Yes, sir.

Q. Is he responsible?

The Court: For what?

Q. For the placement of life rafts aboard the aircraft, for the inspection of the life rafts?

A. Yes.

Q. Are you responsible for the installation on board aircraft departing for an overseas flight, for the installation of life jackets? A. Yes, sir.

The Court: I would like to remind counsel that, as I understand it, counsel is concerned with what the condition was or what was or was not done

(Testimony of Frank B. Kavanaugh.)

with reference to the preparation for a flight of this airplane which executed Flight 324. You should have in mind that specific time. [526]

Mr. Riley: Thank you, your Honor.

Q. Do you know whether or not checks were made for placement of life rafts and life jackets of ship 601 which became Flight 324, January 19, prior to the time ship 601 left the defendant's base at Seattle-Tacoma Airport for its trip to Japan and return prior to the crash on January 19, 1952?

A. No, I do not.

Mr. Riley: I have no further questions.

Mr. Koch: No questions.

The Court: You may step down. Call the next witness.

(The witness was excused.)

WILBUR V. HEWITT

called as a witness by plaintiffs, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Riley): Would you state your name, please? A. Wilbur V. Hewitt.

Q. Where are you employed?

A. At Northwest Airlines, Seattle-Tacoma Airport.

Q. What is your capacity there?

A. I am a foreman on the day shift. [527]

Q. How long have you been so employed?

A. For about eleven years.

(Testimony of Wilbur V. Hewitt.)

Q. Were you so employed during January of 1952? A. I was.

Q. Were you working on January 19, 1952?

A. I don't remember.

Q. You are a foreman. Would you state what your specific capacities are? Are you a mechanic? Describe in detail your duties.

A. My duties are to supervise the mechanical——

The Court: What kind of foreman are you? A mechanical foreman?

The Court: You may say what those duties are.

A. Supervise the mechanical functions of the day shift at the airport.

Q. Would you state what information you have, if any, respecting preparations for the flight of ship 601 to Japan and return, which became Flight 324, on January 19, 1952, and crashed at Sandspit, British Columbia, on that date, with respect to loading and placement of life rafts and life jackets aboard the aircraft?

A. That was so long ago I couldn't recall the facts.

Q. Do you recall the crash?

A. Yes, I recall reading about it.

Q. You were employed at Seattle-Tacoma Airport at the time? [528] A. Yes.

Q. Do you know whether or not any preparations were made with respect to the installation of life rafts and life jackets aboard that aircraft at that time?

(Testimony of Wilbur V. Hewitt.)

A. I couldn't say for positive, but they always are, always have been.

Q. You have no personal knowledge of this particular ship, this particular flight, at that time?

A. Well, at the moment, it has been so long ago that I couldn't recall any details of it.

Q. Do you feel that you would have recalled servicing that aircraft prior to its crash had you done so?

Mr. Koch: I believe the witness has——

The Court: Overruled.

A. I don't believe it would have made any difference. It has been so long ago.

Mr. Riley: I have no further questions.

Mr. Koch: I have no questions.

The Court: Step down. Call the next witness.

(The witness was excused.)

LAWRENCE M. THOMPSON

called as a witness by the plaintiffs, was sworn and testified as follows: [529]

Direct Examination

Q. (By Mr. Riley): Would you state your full name, please? A. Lawrence M. Thompson.

Q. Where are you employed?

A. Northwest Airlines, Seattle-Tacoma Airport.

Q. In what capacity?

A. Mechanical foreman.

Q. How long have you been so employed?

A. Since July, 1949.

(Testimony of Lawrence M. Thompson.)

Q. Were you so employed during the month of January 1952? A. Yes, sir.

Q. Were you working on or about January 19, 1952?

A. I don't remember a specific date.

Q. Do you recall the crash of Northwest Airlines Flight 324 at Sandspit, British Columbia, in January, 1952? A. Yes, sir.

Q. Do you have any personal knowledge as to whether or not life rafts and life jackets were installed or checked by you or any personnel in your charge prior to its departure for Japan and its attempted return as Flight 324 on January 19, 1952?

A. No, sir.

Q. Do you feel that you would recall, had you personally inspected the aircraft? [530]

A. It would be too long ago to remember, I believe.

The Court: Mr. Thompson, do you remember hearing about the accident at the time it occurred?

The Witness: Yes, sir.

The Court: Did anything occur to your mind from hearing of the matter to recall what part, if any, you had in the inspection of the mechanical work and functioning of the mechanical apparatus on the aircraft?

The Witness: No, sir.

The Court: Nothing occurred to you at that time as to what part you had in providing this plane with proper mechanical inspection and maintenance before the flight?

(Testimony of Lawrence M. Thompson.)

The Witness: No, sir.

The Court: You do not recall ever having had anything like that enter your mind at the time of the accident?

The Witness: No, sir.

Mr. Riley: I have no further questions.

Mr. Koch: No questions.

The Court: You may step down.

(The witness was excused.)

GERALD F. WHITTLE

called as a witness by the plaintiffs, was sworn and testified as follows: [531]

Direct Examination

Q. (By Mr. Riley): Would you state your full name, please? A. Gerald F. Whittle.

Q. Where are you employed?

A. Northwest Airlines, here at Bow Lake.

Q. In what capacity?

A. Mechanical foreman.

Q. How long have you been so employed?

A. Ten years.

Q. Do you recall the crash of Northwest Airlines Flight 324 on January 19, 1952?

A. Yes.

Q. Do you have any personal knowledge as to whether or not life rafts and life jackets were installed or checked in the ship which crashed at Sandspit on that date prior to its departure for Japan and its attempted return from Japan?

(Testimony of Gerald F. Whittle.)

A. No.

Q. Would you describe in detail your duties?

A. Well, I am a maintenance foreman, mechanical foreman, supervise mechanical work on the ships on my shift, the second shift.

Q. Would it be your duty to install life rafts and life jackets and to see that they were aboard an aircraft prior to its departure on overseas flights? [532]

A. Not my duty.

Q. Having in mind that you recall the crash of the aircraft on January 19, 1952, did you undertake to ascertain whether or not you had fulfilled all your duties with respect to this aircraft?

A. No.

Q. Do you have any personal knowledge respecting preparation of this aircraft for its flight overseas?

A. No, I don't remember.

The Court: Do you remember the accident?

The Witness: Yes.

The Court: Do you remember anything at the time of the accident occurring to you as to what part you had in outfitting or reviewing the proper maintenance of the aircraft for that flight?

The Witness: No..

The Court: Nothing occurred to you at that time, so far as you now recall?

The Witness: No.

The Court: Wouldn't it normally be of interest to you and the other employees as to who did this job before that plane took off for Japan after you

(Testimony of Gerald F. Whittle.)

heard it crashed? How could you help thinking about that?

The Witness: Well, this is the first—all ships that go overseas have flotation gear on. [533]

The Court: I know, but I am asking you a question: how could you help it? You claim you didn't think anything about what part you had in the mechanical arrangements and the outfitting of the proper equipment, safety equipment, on this airplane before the flight took off. I don't understand how you could help from thinking about what part you played in that after you heard of this ship's crash.

The Witness: At the time of the crash, I had no idea there was any problem in regard to equipment aboard the airplane.

Mr. Riley: I have no further questions.

Mr. Koch: No questions.

The Court: You may step down.

(The witness was excused.)

The Court: We will take a ten minute recess.

(Recess.)

Mr. Riley: Recall Mr. Matthews.

The Court: This witness has been sworn. He will now resume the stand for further interrogation.

EDWARD R. MATTHEWS

Direct Examination—(Continued)

Q. (By Mr. Riley): Mr. Matthews, referring now to what has been marked for identification as Plaintiffs' Exhibit 25, can you tell from the [534]

(Testimony of Edward R. Matthews.)

photograph what the picture indicates, what is in the picture?

A. No. 1 engine, the outer wing panel, a total No. 1 nacelle and engine.

Q. From the picture before you, can you tell the type of aircraft? [535]

A. It is a DC-4 type.

Q. Is the oil cooler assembly located within the engine nacelle?

A. Contained on the nacelle, but not within.

Q. In the case of an aircraft flying at night—for the purpose of the hypothetical question, approximately 1 A.M. Pacific Standard Time—, at an altitude of 10,000 feet, and the pilot reports a sudden loss of oil pressure and a large quantity of oil, do you have an opinion as to whether or not the cause of the loss of oil could be diagnosed while in flight? A. Yes.

Q. Would you state what your opinion is?

Mr. Koch: Your Honor, I object to the question because I don't believe that there is any background established,——

The Court: The objection is overruled.

Mr. Koch: May I state my objection?

The Court: Yes.

Mr. Koch: ——that this witness is an expert with respect to what can be observed on flight. He is head of the mechanical department, but this is a flying characteristic I am not sure he has knowledge of. If he has, I have no objection to his answering.

(Testimony of Edward R. Matthews.)

The Court: The Court feels that has been established already by the question. The objection is [536] overruled. You can ask him what that opinion is that he said he had.

The Witness: You can tell by your lights, by shining out on the nacelle, and can tell the proximity where the oil is coming from, and possibly by the rapid loss of oil you could probably tell from what system it is, and your temperatures will give you an indication of possibly where the problem might exist, and then just from your visual observance of seeing oil overflow in that area, you could possibly tell as to what component it would be.

Q. Do you feel it is possible or probable that the pilot could diagnose the cause of loss of oil?

A. Well, it is both possible and probable.

Q. Do you recall the deposition taken in the Northwest Airlines Office at Seattle-Tacoma Airport with Mr. Peterson, Mr. Karr of the defendant's counsel, Mr. Opsahl, Mr. Pitcher and yourself, wherein I inquired as to whether or not it would be possible to diagnose an oil cooler failure while in flight, and you replied that you could not without removing the cowling from the engine nacelle? Do you recall that testimony? A. I do.

Q. Is that what you stated?

A. I did state to you on the deposition that.

Q. Do you feel now that a pilot could diagnose it in flight?

A. I feel that he could diagnose close enough [537] to what the component may be. When I was

(Testimony of Edward R. Matthews.)

speaking in the deposition, I was speaking of the singular phrasing of oil cooler, and the oil cooler itself has many other components right in the adjacent area, its regulator, the lines attaching it, and we had an oil flap actuating door on that system, and when you speak of oil cooler and a leak in that area, it can be the cooler or its component parts. Singular, whether it is the core of the cooler, regulator, line, gasket, hose, etc., I couldn't single that out, no.

Q. In other words, your testimony is that you couldn't without removing the cowling?

A. I couldn't ascertain definitely, exactly where the leak is without removing the cowling, but I would know it would be in that area.

Q. Would you indicate by outlining on Plaintiffs' Exhibit 25 that portion of the engine nacelle?

Mr. Riley: Pardon me, your Honor. I would like to offer in evidence Plaintiffs' Exhibit 25, having been identified as a photograph showing the No. 1 engine nacelle of a DC-4 aircraft.

Mr. Koch: No objection.

The Court: Admitted.

(Plaintiffs' Exhibit 25 for identification received in evidence.)

Mr. Koch: It is admitted for the limited purpose, is it not?

The Court: For the same limited purpose as that with respect to admission in evidence of Plaintiffs' Exhibit 24.

Q. Referring to Plaintiffs' Exhibit 25, Mr. Mat-

(Testimony of Edward R. Matthews.)

thews, can you tell from the picture from where it was taken?

A. This appears to be from the cockpit, left slide window.

Q. You have been in the cockpit of a DC-4 many times? A. Yes.

Q. Could you see any more or less of an engine nacelle from the cockpit of a DC-4?

A. This is the main view. I would assume this is sitting in the pilot's seat. You can stand up, get up a little more forward. You can change your view slightly from what this photograph produces.

Q. Would you outline in ink or pencil, whichever you have, that portion of the nacelle in which the oil cooler assembly is housed?

The Court: The witness has used an ordinary pen and ink and drawn a circle around something, in which circle there is a figure 1, I believe. That relates to Plaintiffs' Exhibit 25.

Mr. Riley: I call the Court's attention, for the record, to the fact that I am removing from counsel table a file captioned "Record—Engine 701355".

(Record—Engine 701355 marked Plaintiffs' Exhibit 27 for identification.)

Q. Showing you what has been marked Plaintiffs' Exhibit 23, entitled "Pilot's Logs", would you indicate what that document consists of, if you know?

A. This document is the log that is kept aboard the aircraft for pilots to make their entries, and for the maintenance to sign the back side of the

(Testimony of Edward R. Matthews.)

sheet for their entries and corrections and of any maintenance or work performed on the aircraft.

Q. What entries would a pilot make on the pages contained within Plaintiffs' Exhibit 23?

A. What type of entries?

Q. Yes.

A. His entries would then become—it is made up so it is more or less a question and answer book. It is outlined airplane, power plants, instruments, radio, etc. He makes his entries under those different components of the aircraft of any malfunctioning or irregularities.

Q. How often are these reports rendered by a pilot?

A. Between every point to point of his flight.

Q. Is this a requirement made in the usual course of business that a pilot always at the end of a flight renders a report, and in the form of the pages contained in that book? A Yes. [540]

Q. Would each of the pages in that book represent individual flights of the particular aircraft involved? A. Of the aircraft involved, yes.

Q. Are the entries made by the maintenance personnel involved in the logbook required to be made by company policy and procedures by the maintenance people involved?

A. Not all entries are required to be in the logbook, no, in maintenance work.

Q. The entries which are made are required by company procedure, is that right?

A. That's right.

(Testimony of Edward R. Matthews.)

Q. And they are made in the usual course of business? A. That's right.

Q. For what period, referring to Plaintiffs' Exhibit 23, can you tell us what aircraft is reported by that document?

A. The title on the face of it is Ship 601. I assume that each sheet in here is 601.

Q. Is Ship 601 the same ship which crashed at Sandspit, British Columbia, on January 19, 1952?

A. I can't answer that. I don't know.

Q. Does it indicate the serial number of the aircraft on any of the documents within the log?

A. No, just the 601, the abbreviated ship number.

Mr. Riley: I will offer Plaintiffs' Exhibit 23 in evidence, and I believe the record is clear that [541] ship 601 is Douglas DC-4 45342, but it was the ship which crashed at Sandspit, British Columbia. I think that has been adduced in previous testimony, that this was one and the same ship. It has been designated alternatively ship 601, which was Flight 324 on that date. I will ask counsel if he agrees with that.

Mr. Koch: I do not think there is any issue on that particular point, but I have other questions to direct. I have these questions with respect to admissibility of this exhibit. In the first place, I think that the testimony has been that the entries were made by the pilot in part, and if by others, there has been no testimony on that. As I understand it, this record was made up at St. Paul from entries which the pilot made. The pilot's logsheets were

(Testimony of Edward R. Matthews.)

taken off the airplane and sent to St. Paul. Those logsheets never came to Seattle, never were in the possession, custody or control of any witness of the Seattle Northwest Airlines base, and if they are company records prepared and made in St. Paul, then familiarity of this witness with the making of those records and the contents of them is in question.

Furthermore, these have been offered in a considerable number, and the ones at or about the time of the accident, perhaps a month or so back, I can see the relevancy of them, but the ones that go back many, many weeks and months and which [542] may relate to the engine at a time when it had not been given the top overhaul on which testimony has been put in the record would have little bearing, and I think would be misleading.

The Court: Do you wish to make any response to those statements?

Mr. Riley: This is where we left off yesterday. Mr. Koch stated, and I call your Honor's attention to his statement at the time of the motion to quash the subpoenas, he said: "I am willing to agree that all material records of the company made in the regular course of business, that if they are relevant, they may come in." He made some further remarks with respect to a particular parcel of documents, including some photographs, which are contained in this file on counsel table.

The Court: Which has not been marked?

Mr. Riley: Which has not been marked. Aside

(Testimony of Edward R. Matthews.)

from that, I believe Mr. Matthews has identified the document, what it contains, that they are made in the regular course of business, but even though he did not make the entries himself, I do not understand counsel's objection.

The Court: The objection is overruled. Plaintiffs' Exhibit 23 is admitted.

(Plaintiffs' Exhibit 23 for identification received in evidence.) [543]

Mr. Koch: In the statement, relevancy was one of the very conditions I reserved, your Honor.

The Court: You have reserved it, and the Court has ruled upon it.

Q. I will ask you now to refer first to Plaintiffs' Exhibit 27 and particularly to page 1 thereof, and peruse those documents and indicate what that record consists of, if you know.

A. Page 1 is a statement marked as page 1. Do you want me to read the statement?

Q. No. Would you refer to the next page underneath the statement, page 2, and refer to the entries there made and the records and indicate what they are, if you know?

A. These are copied from the logbook, the pilot report and the mechanic report that counteracts the pilot report.

Q. Do those records relate to a particular aircraft and a particular engine?

A. Yes, this is ship 601.

Q. Does it designate the serial number of the engine involved? A. No, it does not.

(Testimony of Edward R. Matthews.)

Q. Would you refer to page 1 and ascertain whether or not there is a reference to a particular engine?

A. Page 1 states "Engine 701355".

Q. Would you refer to the following pages which are numbered 1-8 and ascertain whether or not the [544] documents relate to engine 701355?

A. There is No. 1 engine. They all refer to the position, not the engine number.

Q. Are there reports on the following pages?

A. Excuse me, not all No. 1. There are some on No. 4 here, too, and some on No. 1 and 2 engines.

Q. Are all the reports on the following pages taken from the pilot log reports which are set forth in Plaintiffs' Exhibit 23?

A. These following reports here are taken from pilot's logs. As far as I am able to ascertain, these are made up in St. Paul. I assume they are from the logbook.

Mr. Riley: I will offer Plaintiffs' Exhibit 27 in evidence, if the Court please, and call the Court's attention to the file and the documents contained therein. I believe that they are self-explanatory. We have previously adduced testimony——

The Court: Have you asked the witness if he knows, and if he does, to state what subject matter is dealt with in the communication?

Mr. Riley: Yes, I have, your Honor, and I understand his testimony is that these are summaries and extracts taken from the pilot's logs referring to engine 701355, and showing the——

(Testimony of Edward R. Matthews.)

The Court: Whose extracts? [545]

Mr. Riley: He stated they were taken in St. Paul from the company records, that he believed they were taken, is that correct, Mr. Matthews?

The Witness: Yes, I believe they are. I am not sure.

The Court: And what else?

Mr. Riley: We previously adduced testimony that the No. 1 engine on Flight 324 which crashed at Sandspit, the subject matter of this action, was Engine No 701355, and I believe that an examination of that file before your Honor marked Plaintiffs' Exhibit 27 is altogether clear that it is a summary of all the reports of discrepancies on Engine No. 701355 from the time of its acquisition by Northwest Airlines until the crash of the aircraft. The records contained in the file do relate and do show that this particular engine was installed on two different positions prior to its installation in the No. 1 position. To meet counsel's objection that this is irrelevant, I point out that this record will show, and it does contain, a summary of all the malfunctions of that engine from the time of its acquisition, approximately eight months.

The Court: Whose summary?

Mr. Riley: Mr. Matthews states it comes from the pilot logs, taken from the company records.

The Court: The summary does not come from the logs. State where you see and have found the summary. [546]

(Testimony of Edward R. Matthews.)

Mr. Riley: He has identified it as Plaintiffs' Exhibit 23, the pilot log.

The Court: You do not appreciate the Court's question, Mr. Riley.

Mr. Riley: I am sorry, your Honor. May the witness have Plaintiffs' Exhibit 27?

The Court: The Court is not directing how you shall do it. You may be able to point out a subpoena duces tecum that describes certain material, and you may wish to avert to what conduct has been pursued and what has been done in response to that subpoena duces tecum, among other things.

Mr. Riley: Thank you, your Honor. I call your Honor's attention to the subpoena duces tecum in the Court's file. I will refer to the first one directed to Northwest Airlines, Inc., by its manager.

Paragraph 4 of that document: "All of defendant's records relating to aircraft engine No. 701355, including its report identified as 'Record of Engine #701355', including all reports of discrepancies in said engine from the time of its acquisition from TWA in 1951 until January 19, 1952 and all communications relating thereto, to or from Northwest Airlines."

This file was exhibited to me in response to a previous subpoena duces tecum.

The Court: By whom was it exhibited to you?

Mr. Riley: By counsel for defendant, in counsel's office, and they were further delivered here in court, at the time of the motion of Mr. Koch to quash subpoena duces tecum, they were further de-

(Testimony of Edward R. Matthews.)

livered here, when I asked the Court that they be held in Court for that purpose.

The Court: Was there any statement made about this file by counsel who produced it?

Mr. Riley: No, no specific statement.

The Court: Was there any statement which refers to this file which has previously been referred to by your statement, by counsel as to what they were?

Mr. Riley: Yes, your Honor, and these came from counsel table. Mr. Koch has stated, "I am willing to agree that all of this material are records the company made in the regular course of business, and if they are relevant, they may come in."

The Court: The Court wishes to rule.

Mr. Koch: Your Honor, may I ask the witness a question or two?

The Court: No, the Court is ready to rule. You may cross examine the witness later.

Mr. Koch: Mr. Riley is now offering it in evidence, and this only goes to relevancy. I am trying to determine——

The Court: The Court feels that a *prima facie* showing has been made. You may cross examine. The Court will consider the weight of it after you cross examine. The objection is overruled. Plaintiffs' Exhibit 27 is now admitted.

(Plaintiff's Exhibit 27 for identification received in evidence.)

Q. I will ask you to state what significance a report by a pilot of "Clean engine and accessory

(Testimony of Edward R. Matthews.)

section" is to a mechanic in Northwest Airlines?

A. A clean engine section?

Q. "Clean engine and accessory section".

A. Spray it down, if he just wanted it cleaned.

Q. If an engine is dirty with oil and is reported as "engine dirty", or "engine oily", do you undertake to just clean the engine, or do you undertake to ascertain where the oil comes from?

A. We want to definitely ascertain where the oil leak comes from.

Q. Would you say, in your opinion, that if a pilot reported an engine dirty and the only corrected report reported by maintenance was "engine cleaned", would you say that that was proper procedure?

A. It would have a large bearing on just how dirty it was and what type of dirt. It could be a layer of oil with dirt if they had been in some airport where there was a lot of dust. [549] It could have been a little layer of oil picked up heavy dirt on it, which is a dirty condition. I have never known a pilot to report just "dirty engines." It isn't in our nomenclature of the business.

Q. If the pilot did report a dirty engine, do you feel that the mechanic in charge should do more than wash the engine?

A. Absolutely. I think he should investigate it.

Q. What is the significance to you as a mechanic of a dirty engine or an oily engine?

A. It is significant that you have some—possibly some minor leaks somewhere.

(Testimony of Edward R. Matthews.)

Q. What does blow-by mean?

A. Blow-by is a term, mechanical phrase, where we have two applications, that I know of. There are several applications of it. There is blow-by in the piston rings, in the internal mechanism of the engine. There is blow-by phraseology we use on valves. There is a blow-by phrase on the joints of the exhaust collector rings. There can be blow-by—it can be phrased as any place where there is any passing of gasses or liquids outside of its normal channel.

Q. It is an abnormal condition?

A. Not necessarily. In its application of exhaust systems, it is a normal process. Inside the engine, a blow-by is not considered normal. It can happen and we not know about it. [550]

Q. If the blow-by were visible in the manifold sections of an aircraft engine or by the valve sections intake or valve sections, would that be a serious condition and require correction?

A. The blow-by could be to the extent of open flame, true, it would be hazardous.

Q. If you were confronted with a report which stated, a pilot report in the pilot log which stated, "Oil leak at blower control on rear case mounting pad and bushing," would you state what the significance of that report would be?

A. I didn't hear one word of it. Blow-by in the clutch?

Q. "Oil leak at blower control on rear case mounting pad and bushing."

(Testimony of Edward R. Matthews.)

A. You want to know the significance of that type of leak?

Q. Yes.

A. It could be very insignificant, depending on the amount of oil that has been passed through there.

Q. Failure of the blower control and the bushings and gaskets around it is a very serious problem, isn't it?

A. No, it isn't a serious problem.

Q. If you lost the blower control gasket and the gaskets in flight, it would be a serious problem, wouldn't it?

A. The only seriousness—I am speaking from a [551] mechanical standpoint—it isn't serious as far as we are concerned. It can be a slight oil leak. The seriousness of the pilot predicament, I couldn't answer. It depends on what blower, his altitude, his conditions of flight, whether it is considered serious. Even if he gets stuck on one blower or the other, I don't consider it a serious condition.

Q. Would you say it was potentially serious?

A. No, I don't even think it is potentially serious.

Q. If you had a report which stated, "No. 12 exhaust dogleg loose in exhaust port with blow-by. Call inspector when dogleg is removed," would you state what that report would indicate to you?

A. It would just indicate to me we have an exhaust pipe that is a little bit worn, and we want to have an inspector there to be sure we get a posi-

(Testimony of Edward R. Matthews.)

tive fit when it goes back on. It is a very common term with us.

Q. What is a cracked cowl flap ring?

A. Cracked cowl flap ring is probably a fatigue crack due to the oscillation of the cowl flaps over a large period of time in their support bolts, which is a very minor nature and consequence. It can't go far.

Mr. Koch: Your Honor, on questions of this type would it be appropriate to have counsel state the engine involved and the date to which he makes reference?

The Court: Will you try to make everything [552] specific when you are inquiring concerning condition or presence of any mechanical thing or any apparatus that is physical in nature?

Mr. Riley: Yes, your Honor, I will.

Q. If a report on engine 701355, a pilot report for January 9, 1952, reported, "Engine backfired several times southwest of Shemya. Fuel flow oscillating continuously on the No. 1 engine," what would the significance of that report mean to you as the chief mechanic?

A. Possibly irregularity in the fuel control mechanism.

Q. If a pilot reported next day on the same ship and engine No. 701355, "Fuel flow oscillating", would that indicate to you that the discrepancy had not been corrected?

A. If the backfiring report had been corrected and no further reports on backfiring, it is possibly

(Testimony of Edward R. Matthews.)

in our fuel flow transmitter, probably an oscillation in the instrument. If we are getting a normal engine operation, the transmission of the indication to the pilot getting an oscillation on his fuel flow may be erratic. The engine can still be a normal operating engine, could have been corrected with spark plug or ignition problems.

Mr. Riley: From the pre-trial order, I would like to Exhibit A-3. I will ask that this document, which is attached to the pre-trial order and is identified in paragraph 13 of the pre-trial order as [553] "Flight Plan of Flight 324 of January 18 and 19, 1952, covering the Anchorage to McChord Field leg of the flight, including a forecast cross-section from Anchorage to Seattle, extracts of weather sequence, weather forecast and aircraft service check,"—I will ask the witness to identify it. I believe it is sufficiently identified by the pre-trial order for the record in plaintiffs' case in chief.

Mr. Koch: No objection.

The Court: Do you offer it?

Mr. Riley: I do now offer it.

Mr. Koch: No objection.

The Court: Defendant's Exhibit A-3 is now admitted upon the offer of the plaintiffs.

(Defendant's Exhibit A-3 for identification received in evidence.)

Q. What is the capacity of the oil tanks on individual engines in DC-4 type aircraft?

A. I can't state to the gallon.

Q. Could you refer to A-3 and refer to that por-

(Testimony of Edward R. Matthews.)

tion which is called "Aircraft Service Check", the last page? A. I have it.

Q. Are those documents made for each flight by defendant airlines in the regular course of business? A. Yes, that's right.

Q. What does that portion of Defendant's [554] Exhibit A-3 which captioned "Aircraft Service Check"—what information is contained in that part of A-3?

A. It contains the fueling, the oiling, and the adi, oxygen, hydraulic and turbo, but it isn't required on this aircraft. It is made up to cover all our types of aircraft.

Q. Referring to that document, I will ask you to refer to the portion indicated as oil load. Are you able to indicate what the capacity of the oil tanks on a DC-4 type aircraft is?

A. This is the total each tank, is what we have here. It isn't the maximum capacity the tank will hold. I don't recall what that is.

Q. Does that indicate the maximum the company carried as a matter of policy?

A. That's right.

Q. Do you state that that is less than the maximum capacity of the tank in the nacelle?

A. It has to be.

Q. Can you state approximately what the maximum capacity of the oil tanks in each nacelle is?

A. I would hate to guess and be wrong. I'm strictly guessing.

(Testimony of Edward R. Matthews.)

Q. Would you state to the best of your ability what the capacity would be?

Mr. Koch: I object to any further inquiry along this line. The witness says he doesn't know and [555] would have to guess.

The Court: As to this particular question, the objection is sustained. If you wish to ask certain further types of information, the Court is not excluding that, but the objection to this question at this time is sustained.

Q. Does the report indicate the amount of oil which was supplied to the aircraft prior to its departure from Anchorage to Seattle, the aircraft being Flight 324, Northwest Airlines, January 18-19, 1952?

A. Yes, this indicates the amount of oil that was aboard the aircraft.

Mr. Riley: I would like to have the Court see the exhibit.

The Court: Have you any knowledge sufficient to support any accurate comment you might make on how this amount of oil—was it gas or oil?

Mr. Riley: Oil.

The Court: —provided for the use of this aircraft on this flight compares with that normally supplied for this type of aircraft in the past, prior to this date?

The Witness: That's right. Twenty gallons is the normal for DC-4 type.

The Court: How much was it in this case?

The Witness: It was twenty.

(Testimony of Edward R. Matthews.)

Mr. Riley: I am referring to that portion of the [556] report, your Honor, which is captioned "Oil load."

The Court: "Total oil load", in the second numbered paragraph at the right-hand edge of the page?

Mr. Riley: Yes, your Honor.

The Court: "Engine oil report" is the subject?

Mr. Riley: I am referring to that portion which indicates ten gallons of oil was added to the No. 1 engine for a total load of twenty gallons.

The Court: The Court has made the observation.

Q. If the aircraft service check report indicated that the No. 1 engine of a DC-4 had used much more oil than the other three engines, would you regard the report as significant?

A. Well, yes. I would regard it as significant.

Q. Do you feel that if the No. 1 engine report indicated that ten gallons of oil had to be added prior to its departure, whereas the other three engines required less than three gallons each, would you feel that this report would require an investigation prior to the dispatch of the aircraft after the loading of oil?

Mr. Koch: I don't believe the witness was given an opportunity to answer the last question before Mr. Riley propounded the present one.

Mr. Riley: He stated it was significant.

Mr. Koch: He was talking and would have [557] completed his statement if Mr. Riley had given him the opportunity.

(Testimony of Edward R. Matthews.)

Mr. Riley: I only asked him if it was significant.

The Court: The Court overrules the objection. Read the last question.

(Last question read by reporter.)

A. No.

Q. What, then, is the significance of the large additional amount of oil required for one engine as against the other engines?

A. There could be a lot of factors, depending—maybe somebody has drained the sump or screen on this engine, checking it, have gotten into the oil system checking for contamination. They could do it for a hundred reasons. We don't challenge the amount of oil added, being alerted by the pilot and the amount he records as consumption on the flight. We service it and send it out. It has gone through too many hands in servicing. It isn't necessary to mean—

Q. Would a check be made to see whether or not the engine had consumed the oil?

A. Not unless the pilot reported it on in-bound flight.

Q. If the reports which were submitted did show that this amount of oil was used on the in-bound flight, do you feel an investigation or inspection of the engine should be accomplished under those circumstances? [558]

A. If we had the in-bound information and led us to believe that we had something abnormal, yes, it is our duty to check.

(Testimony of Edward R. Matthews.)

Q. Do you know whether or not the records of Northwest Airlines show whether or not any check was made with reference to Flight 324 prior to its departure from Anchorage as to the reason for the consumption of oil by the No. 1 engine of that aircraft on its flight from Shemya to Anchorage on January 18, 1952? A. No.

Mr. Koch: I object to that question, your Honor. The witness has already testified that there is nothing that indicates that the engine did consume that amount of oil, even though oil was added during the course of the servicing.

The Court: Read the question.

(Last question read by reporter.)

A. No.

Q. Would you state what your duties are with relation to the installation of life rafts, life jackets and emergency equipment in aircraft of the defendant airline, and specifically, your duties as of January 19, 1952?

A. My duties are top supervision of the mechanical department at Seattle. It is under my jurisdiction that these rafts and vests are boarded on the aircraft.

Q. Do you have any personal knowledge as to whether or not this aircraft which was ship 601, [559] which became Flight 324 of January 19, 1952, was loaded with life rafts and life jackets and emergency equipment prior to its departure for Japan? A. It had its proper gear on.

(Testimony of Edward R. Matthews.)

Q. Do you have personal knowledge of that fact? A. I do.

Q. Did you check it personally?

A. I did not.

Q. Who is Burt Wien?

A. Burt Wien was an equipment service man that worked—an employee of Northwest Airlines.

Q. Is he still employed with the defendant airlines? A. No.

Q. Did he have anything to do with Flight 324 prior to its departure for Japan and its attempted return as Flight 324, January 19, 1952?

A. Other than the testimony I have already heard, I don't know. I was unaware of it.

Q. How long was he employed by the defendant company?

A. My guessing, he was there roughly two and a half years, in that neighborhood.

Q. Was he employed in January 1952?

A. I do not know, but I heard testimony to the fact.

Q. Did you discharge him?

A. I did not. Supervisors under me did. [560]

Q. He was discharged, is that correct?

A. I'm not positive if he was discharged or laid off. I haven't checked the records on it.

Q. He was an alcoholic, is that right?

Mr. Koch: I object to the leading form of the question and also to the repetitious nature of the testimony.

(Testimony of Edward R. Matthews.)

The Court: The objection is overruled in this instance. If you know, you may answer.

A. Strictly a personal opinion, from personal calls at my home at late hours, and I have never observed——

The Court: Would you just answer yes or no?

A. No, I don't know.

Q. Do you recall the deposition with Mr. Karr, Mr. Peterson, Mr. Opsahl, Mr. Pitcher, in the defendant Northwest Airlines' office at Seattle-Tacoma Airport in February, wherein you did state he was an alcoholic? A. I did say that.

Mr. Riley: I have no further questions.

(Brief discussion among Court and counsel re length of trial.)

Cross Examination

Mr. Koch: Will you hand the witness Plaintiffs' Exhibit 22?

Q. Yesterday you testified that the No. 1 engine, [561] according to that white card for January 1952, showed under the initials TSO, time since overhaul, 1725 hours 16 minutes, is that correct?

A. That's right.

Q. Is there a similar reference to the time since overhaul on the yellow cards which are also part of that exhibit and are designated engine accessory records?

A. Yes, engine time since overhaul is recorded on this yellow card.

(Testimony of Edward R. Matthews.)

Q. What was recorded on the yellow card, December 17, 1951?

A. Engine time since overhaul is 555.16.

Q. On December 17, 1951?

A. Yes, installed 12/17/51.

Q. On the white card that you testified from yesterday, what is the time since overhaul shown on that same date? A. On the 17th?

Q. December 17, 1951.

A. The white card shows 1725.16.

Q. On what date? A. On the 17th.

Q. Do you have the card, the white card for December, 1951? A. This is January.

Q. Go through the cards and find the December 1951 card.

Mr. Riley: I would like to know what relevancy this has. We are concerned with the time on the [562] engine at the time of the accident, and that was the scope of my direct examination.

The Court: You mean questions on direct examination confined this witness' attention to that time, is that what you meant to say?

Mr. Riley: Yes, your Honor.

The Court: Do you make the point that it did?

Mr. Riley: Yes, your Honor, and that was, as I recall it, the sole scope of my examination at that time, was the amount of time on that engine at the time it crashed.

The Court: This matter is something that might be gone into, if at all, on defendant's case in chief, if counsel's observations are correct.

(Testimony of Edward R. Matthews.)

Mr. Koch: The plaintiff has put in an exhibit, and one part of the exhibit shows the elapsed time on a particular date, and the other part of the same exhibit shows a different elapsed time on the same date. Now, these elapsed times are cumulative. Each time the plane is up in the air ten hours, ten hours of elapsed time is added to the cumulative total. It is certainly most relevant, and directly related to the direct examination, to show that on one set of records there was one total time, whereas on the same date the total time on the other card, which has been erased, and I would like to show——

The Court: Is the import of this question by the [563] present interrogator that another part of this Exhibit A-3 shows some other record that concerns this inquiry?

Mr. Koch: A part of the same exhibit shows that the engine was not overtime at the time of the accident.

The Court: In this same exhibit?

Mr. Koch: In this same exhibit.

Mr. Riley: If the Court please, Mr. Koch knows very well better than that. There is no question but what that engine was overtime and that the records show it was overtime at the time of the crash.

The Court: Both counsel are out of order in arguing the question or in construing the Court's remarks as arguing the question. I ask them to desist taking up the Court's time. Read the question.

(Last question read by reporter.)

The Witness: I can.

(Testimony of Edward R. Matthews.)

The Court: Do you have it?

The Witness: Yes, sir.

A. According to that card, what was the total elapsed time on December 17, 1951?

The Court: The objection is overruled as applied to this question.

A. On December 17, it was 25 hours and 35 minutes.

Q. Is that the time for that day?

A. That is the only entry, would be the total for that day, yes. [564]

Q. Just below the 25 hours 35 minutes you testified to, do you see a cumulative total in the same column, right below the 25.35? A. 1346.06.

Q. Is that hours?

A. I assume to be hours, yes.

Q. On the same date, the yellow card shows a total of how many hours on the No. 1 engine?

A. 17 December, the yellow card shows engine TSO, 555.16.

Q. On the white card, has there been an erasure over which the 1346 hours has been written?

A. Yes, it appears to be.

Q. Can you read what it was previously?

A. It appears to be 555.16.

Q. From December 17, 1951, to the time of the accident, how many additional hours was the No. 1 engine in use? A. From what date?

Q. From December 17, 1951, to the time of the accident.

(Testimony of Edward R. Matthews.)

A. I don't think I can read this thing to interpret that.

Mr. Riley: I think that record shows it, your Honor. He is using our time in this case, and I object to it.

The Court: The objection is sustained. I wish you to handle it in some other way. The Court expressly reserves to you the right to ask that same question as part of defendant's case in chief. [565]

Mr. Koch: My intention has been to examine this witness with respect to the direct examination, conduct a proper cross examination, and not recall him during the defendant's case.

The Court: Try to avoid taking up the time. The Court has limited the plaintiffs' time.

Mr. Koch: Would it be agreeable to the Court if I withheld further examination of this witness and conducted such cross examination in connection with my direct examination at the time I put on defendant's case?

The Court: It certainly would.

Mr. Koch: I will be glad to do so.

The Court: Is there any other question that is really important in connection with direct examination?

Mr. Koch: One or two more questions.

Q. On direct examination, you testified that from the pilot's compartment, from the cockpit, it would be possible to determine that an oil loss was in fact coming from the oil cooler assembly, did you not? A. Yes.

(Testimony of Edward R. Matthews.)

Q. As distinguished from the rest of the No. 1 engine? A. Yes.

Q. I wonder if you would explain, because it wasn't clear to me, how that statement differed from testimony counsel asked you about on a prior deposition I did not attend. [566]

Mr. Riley: I believe he has already testified as to the difference between his testimony.

The Court: You mean in direct examination?

Mr. Riley: In direct examination.

The Court: The objection is overruled.

A. On the deposition, as I stated before, I was asked the question if I could determine whether it was an oil cooler leak or not. I think I said no, I couldn't actually determine. I was thinking singular, of the core of the cooler or jacket of the cooler. There are so many component parts of this cooler, the lines, the regulator, the actuating mechanism of it, to actually——

The Court: I am trying to find out what you are going to tell counsel, what you said on direct examination about that fact. Don't go into a long discussion of it. Counsel asked you to point out the difference between what you said in your deposition and what you said on the witness stand.

The Witness: The difference—I said on the deposition I couldn't, and here on testimony I said you can.

Q. You explained, as I understood it, what you were attempting to convey on the deposition, and I would like you to clear it up for me now.

(Testimony of Edward R. Matthews.)

A. When I was asked if I could tell if it was [567] the oil cooler, I said I couldn't. I don't think there is anybody can tell where a leak is with a jacket on it.

The Court: We don't care what the fact is. What he is asking you is what is the significance of the difference in your statement in the deposition and your statement on direct examination from the witness stand. He does not want anything else. Just point out that difference, if there is any difference.

The Witness: I don't remember all the statements enough to be able to clue my differences.

The Court: Ask him another question.

Q. Referring to Plaintiffs' Exhibit 25, what is it that you have circled in ink?

A. It is the oil cooler cowl.

The Court: What is the function of that cowl?

The Witness: To jacket in the oil cooler.

The Court: Do you mean to suck in air from the outside of the plane as it moves through the air into what?

The Witness: Through the oil cooler cores.

Q. Does the oil cooler cowl house the entire oil cooler assembly? A. Yes, that's right.

Q. Could you determine from a position in the compartment of the plane the pilot occupies whether—

Mr. Riley: I object to the question. This question [568] is obviously repetition. It has already been covered by counsel on his cross examination.

(Testimony of Edward R. Matthews.)

Mr. Koch: I haven't even asked the question.

The Court: Let counsel finish the question, and then the Court will consider it.

Q. Did you testify on the prior deposition that you would be unable to tell whether an oil loss came from the area circled in that picture, from the oil cooler cowl?

The Court: Answer yes or no.

A. No, I don't think I did.

Q. Did you mean on that deposition that you couldn't tell from what portion of the components——

Mr. Riley: Counsel is leading the witness.

The Court: The objection is sustained. Ask him what he meant.

Q. What did you mean?

A. I meant I couldn't tell exactly where the oil was coming from.

Q. When you say "exactly", did you or did you not intend to state that you couldn't tell whether it was coming from the oil cooler cowl?

A. You can definitely tell it is coming from the oil cooler cowl.

Q. You could always tell that?

A. That's right. [569]

The Court: You may have five more minutes to complete cross examination.

Q. Could you tell whether it was coming from some particular component housing in the oil cooler cowl? A. No, I couldn't tell that.

Q. Referring to A-3, which is the flight plan,

(Testimony of Edward R. Matthews.)

aircraft service check, and any other part of that exhibit, are you able to determine the amount of oil loss on the No. 1 engine between Shemya and Anchorage? A. From this report? No.

Q. What is the normal oil carried by a DC-4?

A. Twenty gallons.

Q. In each engine? A. In each engine.

Mr Koch: I have no further questions, your Honor.

Mr. Riley: I have no further questions.

The Court: You may step down.

(The witness was excused.)

Mr. Riley: I would like now to commence publication of the deposition of Lt. Donald E. Baker, taken December 8, 1956, your Honor.

Reading of deposition commenced at line 4, page 3:

The Court: We will take the noon recess until 1:30. [570]

(Discussion re compensation of service personnel.)

The Court: You gentlemen draw up a stipulation. Court is recessed until 1:30 this afternoon.

(Recess.)

The Court: All are present. You may proceed.

Mr. Riley: I have stricken large portions of this, your Honor, so it should go very fast. I would like to commence at line 3, page 5.

(reading deposition)—

Mr. Riley: I will stop at line 20, page 5. I would like to skip to line 10, page 7.

(reading deposition)—

Mr. Riley: I would like to stop at line 25, page 8, and skip to line 24, page 11.

(reading deposition)—

Mr. Riley: I would like to skip from line 19, page 14, to page 16, line 8.

(reading deposition)—

Mr. Riley: I will skip from line 13, page 18, to line 6, page 20.

At line 15, page 20:

The Court: The objection is overruled.

Reading of deposition resumed at line 16, page 20: [571]

Mr. Riley: I will skip from line 21, page 20, to line 3, page 21.

(reading deposition)—

Mr. Riley: From line 23, page 21, to line 21, page 22:

At line 6, page 23:

Mr. Koch: I objected to the further answer, your Honor, because he was referring to hearsay information for the answer, which he did not have of his own knowledge.

The Court: He didn't state any facts by means of reading the contents of anything not in the record. The objection is overruled.

Mr. Koch: Your Honor, he says he saw the radio guide for the airport. That is not in the record.

The Court: He sees it, and his answer after seeing it is independent of it, so far as appears, and the objection is overruled.

Mr. Riley: I will stop at line 5, page 23, and go to line 20, page 23.

(reading deposition)—

Mr. Riley: From line 12, page 24, to line 12, page 25:

At line 8, page 26:

Mr. Koch: At this point I objected, saying that this isn't answering the question as to what type he [572] had, he either knows or doesn't know, and Mr. Riley says, "I think he has answered." I am moving that the answer be stricken as not responsive.

The Court: The objection is overruled.

Mr. Riley: I would like to leave line 8, page 26, and turn to line 12, page 27.

(reading deposition)—

Mr. Riley: To page 31, line 7.

(reading deposition)—

Mr. Riley: From line 22, page 33, to page 34, line 7:

(reading deposition)—

Mr. Riley: From line 16, page 34, to page 35, line 6:

(reading deposition)—

Mr. Riley: From line 17, page 35, to page 37, line 19:

At line 22, page 37:

Mr. Koch: I object to the question, your Honor. Objections are reserved until this time, and his physical condition is not in issue in this case.

The Court: What have you to say in response to that objection?

Mr. Riley: The relevancy of that statement and his condition at that time is to demonstrate the ordeal that our one plaintiff who did survive underwent, and to show that—— [573]

The Court: What kind of condition are you going to show, or do you seek to show?

Mr. Riley: Our offer of proof is that all these survivors were frozen, not frozen to ice as such, but were in extremely poor condition, and that they all——

The Court: Do you seek to show that this deceased and injured passengers suffered, in common with all other passengers who were similarly submerged in water, a chill to the extremities which you seek to show by the evidence?

Mr. Riley: Yes, your Honor, and it would tend to show and to substantiate Mr. Maynard's testimony to the effect of his injuries.

Mr. Koch: Your Honor, this starts out in the middle, but if we go back a page or two, other questions were asked and I objected each time to the admissibility of questions relating to the physical condition of the witness Baker. At no time does he testify what the physical condition of Maynard was, or of any of the other seven passengers. We have already had the questions and answers that show that this man was not in good condition, that he was going under water when the rowboat was bringing him to shore, that they had to put him across the boat to save him. The suffering that he underwent cannot be related to other persons whose stamina and physical condition at that time is

something that this witness' testimony [574] would not cover. The first question here refers to whether or not he was conscious. There is no question of consciousness in the case of Mr. Maynard. Mr. Maynard testified fully with respect to his own condition.

The Court: I understand the offer of this is to show circumstantial evidence supporting the plaintiffs' evidence in each case respecting the chill and the effects of chill on the two plaintiffs, one the decedent on whose behalf the suit in the Gorter case is brought, and the other the plaintiff Maynard, and that such circumstantial evidence is offered not to prove any state or condition or damage which the other people had so far as they were concerned, but merely to show a circumstance resulting generally from the same kind of conditions as to which the plaintiffs in the two suits alleged was experienced by the plaintiffs in each of those two suits, is that right?

Mr. Riley: That is correct, your Honor.

Mr. Koch: Your Honor, that is not correct.

The Court: That is my understanding of what they offered to do, and my understanding of the limit they place around the offer.

Mr. Koch: That would not be true of the deceased. It could only be true of Maynard, at the most, because there is no cause of action for pain and suffering or physical damage to the deceased. This is a wrongful death [575] action in which the statute creates a cause of action for loss of sup-

port, but not survival action for his pain and suffering.

The Court: What have you to say about that?

Mr. Riley: Well, it is true that we cannot recover—I am not sure about the item of damages as to pain and suffering, but it would tend to show the cause of his death.

The Court: The Court sustains the objection as to the plaintiff Gorter, and overrules the objection as to the plaintiff Maynard upon this condition: that the evidence is received and the Court will consider it only for the purpose of showing the conditions, insofar as it may, as circumstantial evidence, the conditions of chill and cold from which the plaintiff Maynard claims to have been damaged in part in his experience.

Mr. Koch: Your Honor, does that mean that each of the answers will be permitted on the basis——

The Court: Anything relating to that cause and effect from that cold will be heard for the limited purpose which the Court has indicated. It will not be considered by the Court for any purpose in the Gorter case and will be considered for the purpose stated by the Court, and only that purpose, in the Maynard case.

Reading of deposition resumed at line 22, page 37: [576]

At line 25, page 37:

Mr. Koch: I object to that, because it has no relation to chill or cold.

The Court: Do you offer it only as whatever connection it has with chill or cold?

Mr. Riley: How could he observe it if he wasn't conscious, your Honor, and, of course, I just want to show his general condition as tending to show what Maynard's——

The Court: You are not offering to show unconsciousness produced by anything other than the chill from the water, is that right?

Mr. Riley: Yes, your Honor, that is right.

The Court: The objection is overruled.

Reading of deposition resumed at line 25, page 37:

(reading deposition.)

Mr. Riley: I would like to leave line 3, page 38, and turn to page 40, line 1.

At line 1, page 40:

Mr. Koch: I object to that question, because that has nothing to do with the chill or cold, whether this witness was in pain some days later.

The Court: I am going to sustain that objection. There are too many if's and and's about that. He might not have had any treatment. He might have gotten cold again. This other is something that occurred at or about [577] the time of the crashing of the airplane.

Mr. Riley: I will delete the remainder of the deposition and offer——

The Court: Do you include in that omission to use the deposition all of page 40, in view of the ruling?

Mr. Riley: Yes, your Honor. I will delete the

remaining portions of the deposition as part of our case in chief and offer that which has been read into the record as part of plaintiffs' case in chief, subject to the conditions already stated. The deposition is concluded at line 10, page 42.

The Court: Isn't there more of this deposition in another volume?

Mr. Riley: Yes, your Honor. That is cross examination by the defendant, in another volume, taken two days later, on agreement with counsel.

The Court: Is there anything there which you wish to read?

Mr. Riley: I have nothing I wish to offer as part of plaintiffs' case in chief.

The Court: If, however, the defendant wishes to use the cross examination, he is entitled to read it now, if he wishes. If he wishes to reserve his final decision whether to use it or not until his own case, he may do that.

Mr. Koch: I think we should dispose of it now, your [578] Honor, as long as we are on the deposition.

(Brief discussion re reading cross examination.)

Mr. Koch: Starting at page 2, line 14, of the second volume, your Honor:

The Court: I am not going to give you time to read that kind of material. If there is something material, I will be glad to hear it as a part of this time that is being consumed.

Mr. Koch: Skip to line 7.

Reading of deposition resumed at line 7, page 6;

At line 19, page 6:

Mr. Koch: Skip the rest of page 6, down to line 4, page 7:

At line 6, page 7:

Mr. Riley: I would rather not waste time objecting, but that is the same——

The Court: I don't see what that has to do with the issues in this case. See if you cannot find some place where you are interrogating him about this cold condition and the effect on him as a circumstance bearing on the chilled condition of the water and any other subject.

Mr. Koch: Skipping to line 19, page 8: [579]

At line 7, page 9:

Mr. Riley: I will object to the question for the same reasons that counsel——

The Court: Can't you ask him the question?

Reading of deposition resumed at line 7, page 9:

At line 15, page 13:

Mr. Koch: Line 16, page 14:

(reading deposition.)

At line 15, page 16:

Mr. Koch: The question on page 17 is a long statement, quoting from another deposition, your Honor.

The Court: Two-thirds of the space are your statements preliminary to your final questions of the witness. Pick out the question you submit to the witness in each case.

Reading of deposition resumed at line 14, page 17:

At line 2, page 21:

Mr. Koch: Line 17, page 21.

(reading deposition.)

At line 11, page 23:

Mr. Koch: That is all, your Honor.

Mr. Riley: At line 2, page 21, your Honor:

(reading deposition.) [580]

At line 16, page 21:

Mr. Riley: That is all, your Honor. I do not wish to submit the redirect examination.

The Court: This deposition, so much of it as read, is received in connection with and as part of plaintiffs' case in chief, so far as it relates to each one of them separately.

Mr. Riley: I would like to call Mr. Cox.

DUDLEY S. COX

called as a witness by the plaintiffs, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Riley): Will you state your name for the record, please? A. Dudley S. Cox.

Q. By whom are you employed?

A. Northwest Airlines.

Q. Were you employed by Northwest Airlines on January 19, 1952? A. I was.

Q. What was your capacity then?

A. Manager of flight operations.

Q. What was the scope of your duties? Did it encompass the entire airline? [581]

A. That is correct.

Q. What were your specific duties as manager

(Testimony of Dudley S. Cox.)

of flight operations of the defendant, Northwest Airlines?

A. As manager of flight operations, I had administrative supervision of flight personnel over the entire system.

Q. Mr. Cox, did you investigate the crash of Northwest Airlines Flight 324, which crashed at Sandspit, British Columbia, January 19, 1952?

A. I did.

Q. In the event of the crash of a commercial flight of the defendant airline, is it usual procedure for members of the corporation to be assigned to the accident investigation and to render reports to the Civil Aeronautics Board and to the company?

A. No, it isn't.

Q. Do you mean to say that in case of a crash of an aircraft today, that it isn't usual procedure for a member of the airline to be designated to attend the hearings and to assist the Civil Aeronautics people in investigating the accident?

A. It is the duty of the Civil Aeronautics Board to investigate and find the probable cause of the accident. The airline assigns people to assist the Board in their investigations. That is what I meant when I said——

Q. The individuals assigned to the Board do render written [582] reports to the Board?

A. If the Board calls on them to render written reports, they do.

Q. And copies of those reports are received by

(Testimony of Dudley S. Cox.)

the company, kept in the company's records concerning that crash, is that right?

A. I can't say. May I explain?

Q. Please do.

A. The Board, the CAB, requires the company to furnish certain material with respect to the history of the flight. That material is assembled and given to the CAB.

Q. Are copies of that kept in the records of the company?

A. I presume that they are. I am not sure who finally files them.

Q. Is it ordinary procedure for the airline to be interested enough to undertake its own investigation and ascertain whether or not they differ with the conclusions of the CAB?

A. Normally they don't, no.

Q. Are you stating that it is normal procedure for Northwest Airlines not to investigate a crash of its own aircraft?

A. Perhaps I don't understand you. We do investigate the accident with respect to our part, and our assistance to the Civil Aeronautics Board. We do not publish, nor do we expect our people to publish their findings and guessing what the probable cause is. That is not our responsibility, [583] and the corporation does not require nor order us to do that.

Q. But the corporation wants to know for itself what the cause of the accident was, isn't that correct?

(Testimony of Dudley S. Cox.)

A. They are not interested in my personal opinion, if that is what—they don't want me to advance an opinion.

The Court: You mean on the witness stand, don't you?

The Witness: No, sir.

The Court: I get that impression from what you say. If that isn't true, answer these questions frankly and responsively as they are put to you. You are not giving the Court the impression you are doing so. I ask you to undertake these questions and forget the cautions you may have surrounded yourself with before you came to the witness stand, and the over-anxiety you may have about the ability of others to get the truth about this matter, and tell all you know about it. Proceed, in response to these questions.

Q. Isn't it a fact that it is standard procedure in the event of any crash of any Northwest Airline or any other airline in the United States, for the airline to assign its own personnel to investigate the crash and to cooperate with the Civil Aeronautics Board and to render reports not only to the company but to the CAB?

A. With respect to the reports to the Board, to give the Board [584] anything they want, anything that is within their power. In the case of their own company with respect to written reports, there is a manual procedure which requires the assembling of all these reports. There is no place in the manual which directs me, as manager of flight

(Testimony of Dudley S. Cox.)

operations, to write a report to the president of the airline.

Q. No, but isn't it a fact that personnel are assigned to do this, whether it is you or anybody else?

A. Not assigned to write reports.

Q. Weren't you assigned, as manager of flight operations—weren't you ordered by the powers that be in Northwest Airlines to investigate this crash?

A. That is correct.

Q. In Plaintiffs' Exhibit 21, I will ask you to refer to that letter and peruse the contents, and ask you whether or not you rendered that report.

A. Yes, sir.

Q. And copies of this are retained in the defendant corporation records, are they not?

A. Yes, sir.

The Court: State, if you know, who signed the original of that letter?

The Witness: I signed it, sir.

Mr. Riley: I offer Plaintiffs' Exhibit 21 in evidence, if the Court please. This was the subject of [585] controversy yesterday at the time I examined Mr. Matthews, and we withheld it to this time for identification by Mr. Cox.

Mr. Koch: No objection.

The Court: It is admitted.

(Plaintiffs' Exhibit 21 for identification received in evidence.)

Q. This is a report, is it not, and to whom was it—

The Court: What do you refer to?

(Testimony of Dudley S. Cox.)

Q. Plaintiffs' Exhibit 21 was a written report by you as manager of flight operations, was it not?

Mr. Koch: I think that document speaks for itself. It is obviously a letter.

The Court: The objection as to the form of the question is sustained, with leave by proper form of question to inquire what was the nature of the subject matter dealt with in the letter.

Q. Referring to Plaintiffs' Exhibit 21, Mr. Cox, would you state what the nature and reason for the promulgation of this letter was, if you know?

A. This is a letter addressed to Mr. Leon D. Cuddeback, Civil Aeronautics Board, in Seattle, Washington, and signed by myself, dated March 28, 1952.

Q. What was the purpose of the letter?

A. It is an outline of the general procedure applicable to [586] required pilot action in the event of engine failure in flight.

Q. The exhibit states: "The term 'emergency situation,' as used in this section"—referring to Part 41, Northwest Airlines Operations Manual, Volume D, Reference 4:5:15—"may be interpreted to mean an unexpected occurrence or condition requiring immediate action to meet its danger. Such an unexpected occurrence or condition might, under certain circumstances, include an icing condition, engine or structural failure, weather condition, danger of collision, etc. It is not the intent of this regulation to require a situation or condition to become critical before such emergency authority

(Testimony of Dudley S. Cox.)

may be exercised. The pilot should make a common sense evaluation of the factors and information available to him. If, after such an evaluation, he reasonably believes that under the circumstances an emergency exists or will be created, he is permitted to exercise an emergency authority and deviate from prescribed regulations and procedures to the extent required to avoid the emergency situation."

Was that statement which I have just read in effect at the time of the crash of Flight 324 at Sandspit, British Columbia, on January 19, 1952, by the defendant airline?

A. It was my understanding it was.

Q. Is it true, as stated in that letter, as of January 19, [587] 1952, that: "An engine failure in-flight, regardless of whether or not the operating efficiency of the aircraft has been impaired, is classified in company operating procedures as an emergency situation."?

A. I cannot answer that directly. It is classified under certain conditions as an emergency, and certain conditions as a potential emergency.

Q. You have stated in your letter of March 28, 1952, that: "An engine failure in-flight, regardless of whether or not the operating efficiency of the aircraft has been impaired, is classified in company operating procedures as an emergency situation." Was that true on January 19, 1952?

A. That is correct.

(Testimony of Dudley S. Cox.)

Q. Now, page 3 of Plaintiffs' Exhibit 21, you have stated that the company regulations require that, and you have contained therein the following designated company policy for engine-out operation: "1. The captain and flight superintendent shall collaborate and determine what is the nearest suitable airport taking into consideration such factors as: a. Nature of the malfunctioning and the possible mechanical difficulties that may be encountered if flight is continued including failure of other engines. b. Altitude, aircraft weight and usable fuel at time of stoppage. c. Weather conditions and terrain enroute and at possible landing points. d. Air traffic congestion [588] enroute and at various available airports. e. Pilot's familiarity with the airport and surrounding terrain. f. Nature of failure insofar as related to airport safety facilities such as crash and fire-fighting equipment." Was that the company policy which was in effect—I mean by "company," the defendant, Northwest Airlines company policy—with respect to engine-out operations which was in effect on January 19, 1952? A. That is correct.

Q. It also states: "Upon reaching an agreement with the captain as to which is the nearest suitable airport, the flight superintendent shall clear the flight to that airport."

Was that policy in effect by defendant Northwest Airlines on January 19, 1952?

A. May I deviate just a moment to explain?

The Court: Can you answer it, and then, if you

(Testimony of Dudley S. Cox.)

need to, make an explanation in order to be sure that your answer is full, true and correct.

A. It isn't necessary that the flight superintendent clear the pilot to make a landing if the pilot exercises his emergency authority as outlined on page 1 of that letter.

Q. But it is necessary for the captain and the flight superintendent to collaborate and determine which is the most suitable airport? [589]

A. Not unless the pilot asks that. If the pilot exercises his emergency authority, he is the sole judge of that.

Q. That isn't what this says, is it, Plaintiffs' Exhibit 21? A. Page 1 says——

Q. But refer to page 3.

A. Page 3 is the company policy, all other things being equal.

Q. Do you know who the flight superintendent was at Seattle on January 19, 1952?

A. That was Mr. Smith.

Q. Mr. Smith, who testified here earlier?

A. That is correct.

Q. I will ask you to refer to the signature contained on page 5 of that document, and state, if you know, whose signature that is.

A. That is my signature.

Q. What is the nature of the document which is identified as Plaintiffs' Exhibit 28?

A. Plaintiffs' Exhibit 28 is a statement concerning the accident, MATS Flight 324, January 17th.

(Testimony of Dudley S. Cox.)

Q. Were you requested to make that statement?

A. No, I wasn't. I made the statement of my own volition.

Q. And did you make it in your capacity as manager for flight operations of the defendant, Northwest Airlines, at the time it was rendered?

A. That is correct. I made it in Vancouver.

Q. When was that statement rendered?

A. The Department of Transport held a hearing in Vancouver concerning this accident, and I drafted this statement to submit to the Department of Transport, to ask that they enter in their proceedings there. They did not do so.

Q. Was this document also submitted to the CAB and to the company?

A. Yes, I presented it to the CAB.

The Court: Did they accept it?

The Witness: I think so.

The Court: What the Court means is, did they take any action that indicated to you that they did not accept it as a report from you?

The Witness: No, sir, not to my knowledge.

Q. Would you state when you rendered this report?

A. I don't remember the exact date. It was in Vancouver, sometime subsequent to the accident.

Q. First of all, what was the nature of the statement or report?

A. It is a statement of the facts, as I saw them, surrounding this accident.

The Court: In the light of what you had learned

(Testimony of Dudley S. Cox.)

about such investigations and reports as had come to your attention?

The Witness: Yes, sir, in Sandspit.

Mr. Riley: I will offer Plaintiffs' Exhibit 28 in [591] evidence as an additional report made by Mr. Cox in his capacity as manager of flight operations.

Mr. Koch: This report is not admissible, because it is a report made to the Civil Aeronautics Board. He can be questioned with respect to material, the subject matter covered by that report, but the report itself is barred by the statute. The statute encourages——

The Court: I do not know whether that is true or not.

Mr. Koch: This is an exhibit before the Civil Aeronautics Board, and counsel is attempting to introduce a copy of the record before the Civil Aeronautics Board to conduct an investigation to determine the facts and circumstances surrounding this accident.

The Court: What is the citation?

Mr. Koch: 49 USCA, Sec. 581.

The Court: "No part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit * * *"

Mr. Koch: Your Honor, this is part of the investigation.

(Testimony of Dudley S. Cox.)

The Court: Does that not relate to their records?

Mr. Koch: It relates to the filings made to that Board.

The Court: Was this a part of that Board's files?

Mr. Koch: Yes. It was submitted at their request [592] by Northwest Airlines to the Civil Aeronautics Board.

Mr. Riley: This is not a report of the Civil Aeronautics Board. This is a report of Mr. Cox, who is the manager of flight operations of the defendant airline.

The Court: I understand that this came from Northwest files, or from this witness' files, or am I incorrect in that?

Mr. Riley: If your Honor please, this particular document did not come from Northwest. I know they have it. It is a report made by Mr. Cox. I got this copy from the Civil Aeronautics Board file, but it is not a report of or by the CAB or any of its agents. This is a report of Mr. Cox, manager of flight operations of the defendant airline.

The Court: Is the source of this thing, so far as you are concerned, the files of the Board or Authority?

Mr. Riley: Mr. Cox is the source, your Honor.

The Court: You will have to point out some authority. I do not know whether there is a distinction between all copies of this man's report now in CAB files, or whether it also includes copies thereof which are not in his hands.

(Testimony of Dudley S. Cox.)

Mr. Koch: Your Honor, this particular document was obtained from the Civil Aeronautics Board. It is part of the filings in connection with the investigation of this accident. The CAB itself is charged with the investigation of air accidents.

The Court: Did this thing come from that Board's files?

Mr. Koch: Mr. Riley just said it did.

The Court: The objection is sustained.

Mr. Riley: Your Honor, my statement is that the statute only precludes the admission of reports and records of the Civil Aeronautics Board and made by their agents.

The Court: I will have to overrule you on that contention, Mr. Riley. I feel compelled to sustain the objection because the statute says the Court must. In effect, that is what the statute says.

Mr. Riley: At this time, I call your Honor's attention to my previous motion requesting the Court to strike portions of the defendant's answer and to impose costs for failure to obey lawful subpoena duces tecum. The first time this subpoena duces tecum was served was on February 19, on the defendant, Mr. Peterson.

The Court: I think it would be more in order from the standpoint of appropriate time to take up the subject at the end of your case in chief than it is now, unless that is what you have now reached.

Mr. Riley: Very well, your Honor. Just briefly, I subpoenaed reports of the company investigation board or agents and the conclusions of such board

(Testimony of Dudley S. Cox.)

or agents, and also all the records and reports of Northwest Airlines [594] concerning Flight 324. I have never been given them. Your Honor continued our motion to strike and to impose costs, etc., on Mr. Karr's statement these records would be delivered. I think they have not complied with that, and I will renew the motion later and proceed with other matters.

The Court: You may do that.

Q. You visited the scene of the crash of the aircraft in the course of your investigation several times, is that correct? A. That is correct.

(Photographs marked Plaintiffs' Exhibit 29 for identification.)

Q. Do you know whether any bodies were recovered from inside the fuselage of the aircraft?

A. No, sir, I don't know.

Q. How soon did you reach the scene of the crash?

A. I think it was about 18 to 24 hours after the accident. I couldn't be exact.

Q. Who is Mr. Paul Sanders?

A. Mr. Sanders is supervisor of line maintenance, I believe, for Northwest Airlines.

Q. Do you know whether or not he was assigned and requested to testify and to assist the CAB in its investigation?

A. I can't say directly. I am sure he was. He was there on [595] the scene of the accident.

Q. Was he there with you at the time of the investigation you conducted?

(Testimony of Dudley S. Cox.)

A. Yes, sir. He is in a different department than I.

Mr. Riley: May the record show I am withdrawing from counsel's file a letter dated April 10, 1952, to Mr. Matthews from Mr. Paul Sanders, and ask it be marked for identification.

The Court: Do you mean withdrawing from the files produced by counsel for defendant and left on the counsel table in the courtroom?

Mr. Riley: Yes, your Honor.

(Letter of April 10, 1952, marked Plaintiffs' Exhibit 30 for identification.)

Q. Showing you what has been marked Exhibit 29 for identification, have you seen those photographs before?

A. Yes, sir, I have seen those photographs before. In general, I think they are enlarged, but I believe these are the same photographs I have examined before.

Q. Were you present when the photographs were taken? A. No, sir.

Q. Were they taken by personnel of Northwest Airlines? A. I was told so.

Q. Do you know approximately when they were taken?

A. I was informed they were taken in June, 1952. [596]

Q. And what did the pictures show?

A. Well, the first picture shows Captain Leonard, Northwest Airlines.

(Testimony of Dudley S. Cox.)

The Court: In what kind of surroundings or setting?

The Witness: Standing between engines 3 and 4 on the wing panel of an airplane in the water.

The Court: Are they in or out of water?

The Witness: The portions of airplane are in the water.

Q. What airplane?

A. I was told that this was the airplane at Sandspit.

Mr. Koch: I object.

Q. As a matter of fact——

Mr. Koch: The information about when the photographs were taken and by whom they were taken, of what it was taken, this witness has no personal knowledge. He is giving some hearsay information he has received.

The Court: I am not too certain about what you observed concerning the information of this witness. I believe I will leave it to further interrogation.

Q. As a matter of fact, you rendered a report and submitted those photographs with the report, isn't that right?

A. I believe that is correct. This material was assembled and forwarded to Washington.

Q. As a part of the continuing company investigation of the crash of Flight 324 at Sandspit? [597]

A. Yes, I believe that is correct.

The Court: Who forwarded it, if you know, with reference to whether or not it was forwarded

(Testimony of Dudley S. Cox.)

by anyone on behalf of Northwest Orient Airlines?

The Witness: I am reasonably sure that came from my office. I can't recall specifically the date, but I am reasonably sure that came from my office.

Mr. Riley: I offer in evidence Exhibit 29.

Mr. Koch: It is objectionable for the same reason.

The Court: The Section 581 objection?

Mr. Koch: Yes, Your Honor, on file with the Civil Aeronautics Board. The testimony has been that M. Sanders sent these pictures to the CAB.

The Court: Mr. Riley, I will have to advise you that what I approve of your doing in the case of a 581 objected-to exhibit is that you identify and make a record on your offer of it, and then, unless there is some exception to it from the application of the rule laid down in this Section 581, I say to you I do not wish you to press the matter.

Mr. Riley: I offer to show that those records did not come from the Civil Aeronautics Board. They were taken from counsel table, produced in response to a subpoena duces tecum. I subpoenaed those photographs, which were produced to me in Mr. Koch's office prior to trial. [598]

Mr. Koch: Now we are back to the material Mr. Riley had transcribed by the court reporter at the beginning of the trial.

(Further argument between counsel.)

The Court: The Court wishes to ask this witness one or two questions.

(Testimony of Dudley S. Cox.)

The Court: Mr. Cox, did you personally direct any person to obtain these photographs?

The Witness: Yes, sir.

The Court: I mean the originals.

The Witness: Your Honor, I asked that they go up to Sandspit to attempt to get to the wreckage, and, if possible, obtain photographs.

The Court: What persons?

The Witness: Mr. Helm.

The Court: Whose employee is he?

The Witness: He was Northwest Airlines' chief pilot, at that time, based in Seattle.

The Court: Did you ask anybody else to go with him?

The Witness: I suggested to Mr. Helm he take a representative of the Airline Pilots' Association.

The Court: Did he or did he not?

The Witness: He did.

The Court: Do you know what it was that caused you to ask him to do that? [599]

The Witness: There was an extremely low tide in June, or approximately in June of that summer, and it was thought that we could get to the remains of the wreckage.

The Court: To get some more information, other than what you had?

The Witness: That is correct.

The Court: Did you get that before you were asked by the Civil Aeronautics Board to make any report of any investigation to or for them?

(Testimony of Dudley S. Cox.)

The Witness: Your Honor, we told the Civil Aeronautics Board that we would go up at any low tide that we could to get information which we would submit to them. The CAB at its hearing in Seattle, at the conclusion the hearing officer said that the hearing would—I believe the words were would remain permanently open for the admission of other material if it was available.

The Court: Did you make any move to get this material before the Civil Aeronautics Board asked that it be obtained, if they did ask that it be obtained? I do not understand from what you have said whether they specifically asked you to obtain pictures or not, or what it was that stimulated that move and thought.

The Witness: Your Honor, I don't think they specifically asked. In discussing the matter, we said we would do that. They agreed that would be a good thing if [600] we could do that.

The Court: I do not understand whose idea it was to get them, to get the information at the place where you got these pictures. That is what I do not know. I do not know whether it was your idea formed before the Civil Aeronautics Board investigation was brought to your attention or before any questions were asked of you, or when it was. That is what I do not understand, when it was with reference to the beginning of the Civil Aeronautics Board investigation and the plans therefor, that you determined that you would undertake to get these photographs.

(Testimony of Dudley S. Cox.)

The Witness: Well, Your Honor, at the scene of the accident, immediately, two or three days afterward, there was a low tide at night and we did attempt to walk to the wreckage at that point. The CAB did not go out. They considered it too hazardous. Some of us did go out, tried to walk.

The Court: Within how many days of the occurrence of the accident was that?

The Witness: Within three days, I think.

The Court: You tried to get photographs at that time?

The Witness: It was at night. We attempted to get on board the wreckage. We could not do so.

The Court: When was the first time you said anything about trying to get photographs, approximately? [601]

The Witness: It was during the time we were at Sandspit, within a week.

The Court: In the month of January?

The Witness: Yes, sir.

The Court: Are there any further questions you wish to ask of this witness?

Mr. Riley: No, Your Honor. I wanted to cite the case of *Tansey v. Transcontinental & Western Air*, 97 Federal Supplement 458.

(Further argument between counsel.)

The Court: We have used a great deal of time. I am going to have to rule. The ruling is to overrule the objection and permit the reception of this as being a company record and not a Civil Aeronautics

(Testimony of Dudley S. Cox.)

Board record. I am not going to look at these pictures. I glanced at them a moment ago for the purpose of seeing the background of water, and all I could tell you that is in the pictures is water. I know there are some objects, but I cannot name any objects in the pictures. I am not going to look at those pictures until you have a chance tomorrow to look for some more law on this subject. It would seem to me if I had a copy of the Civil Aeronautics Board record which is a part of my file, that that would not be the file that that statute is talking about, and I cannot believe that it is unless you show me some authority that it does apply [602] to everybody else's files if there are copies of the reports and statements that were sent by the person making the report or statement to the Civil Aeronautics Board, especially if they were, as in a case like this, a part of the company's records. That is what I believe this really is.

It is true that it is also a copy of an original that was intended for and was sent to the Civil Aeronautics Board in the course of the investigation by the Civil Aeronautics Board, but, as I say to you, I am not going to look at these pictures again until about the close of this case, giving to counsel further time to see if there are any more cases on this subject. Plaintiffs' Exhibit 29 is now admitted, subject to that condition.

(Plaintiffs' Exhibit 29 for identification received in evidence.)

(Testimony of Dudley S. Cox.)

Q. The exhibit you have in your hand, Plaintiffs' Exhibit 30 for identification, I notice it bears your name on the lower lefthand corner. Do you recall having received that communication?

A. Yes, sir.

Q. By whom was the communication promulgated?

A. From Mr. Sanders.

Q. What does it purport to show?

A. It is a summary of the oil consumption for Engine [603] No. 701,355, which was installed in the No. 1 position on aircraft 601, N45342.

Q. Does it show the amount of oil consumed by Flight 324 of the 17th between Shemya and Elmen-dorf, January 17, 18, 19, 1952?

A. Yes, it does.

Q. From where would that information be obtained?

A. It would be obtained from records, I assume at Anchorage, which would be forwarded to St. Paul after they were compiled.

The Court: What is the nature of the information on that exhibit, Mr. Cox, if you know?

The Witness: The consumption of oil in this particular aircraft engine.

The Court: What kind of document is it? Is it a study, a report?

The Witness: It is a report, a record of the No. 1 engine oil consumption, gallons per hour.

Mr. Riley: I offer Plaintiffs' Exhibit 30 in evidence at this time, if the Court please, on the basis of the witness' identification of the document.

(Testimony of Dudley S. Cox.)

Mr. Koch: I have no objection.

The Court: Admitted. [604]

(Plaintiffs' Exhibit 30 for identification received in evidence.)

Mr. Riley: If the Court please, I call attention briefly to the next to the last line on page 2 of that document, which indicates, as Mr. Cox has testified, the amount of oil used in the flight of Flight 324 between Shemya and Elmendorf, and it shows ten gallons of oil were used. My purpose in submitting this at this time is to call Your Honor's attention to the previous testimony of Mr. Matthews, who indicated, if that much oil had been used in flight, it would have been his duty to have inspected the aircraft prior to releasing it from Anchorage.

Q. You are a pilot? A. That is correct.

Q. You have had considerable flight experience?

A. Yes.

Q. How long have you been flying?

A. About 25 years.

Q. And you have approximately how many hours? A. 15,000.

Q. Is that all commercial experience?

A. Some of it was obtained in the Army and the Air Force.

Q. Directing your attention to the month of January, 1952, and assuming a flight of a DC-4 aircraft operated by Northwest Airlines, generally described as Flight 324, which departed Anchorage approximately 10 P.M. at night bound for Seattle

(Testimony of Dudley S. Cox.)

with a load of forty passengers and a [605] crew of three consisting of the pilot, co-pilot and stewardess; and assuming further that at a point approximately due west of Sitka, Alaska, or midway in the flight to Seattle, the No. 1 engine on the left side of the aircraft was secured and the propeller feathered; and assuming further that the weather at the point of destination, which was Seattle, the Seattle area was clear and that landing conditions at the destination were normal, and that at the time of feathering of the engine the aircraft was approximately three and a half hours from Anchorage; and assuming further that the time to Sandspit would be approximately one and a half hours; and assuming that the airport at Sandspit had a runway approximately 5,100 feet in length and that the airport was situated on water; and assuming that the weather conditions at Sandspit were reported to have been 1200 feet broken overcast with visibility reduced and light snow showers to one mile; and assuming further that Sandspit airport was without normal precautionary safety equipment such as fire equipment or rescue equipment; and assuming further that either the pilot or person in charge of the operation of the aircraft decided to make an unscheduled landing at Sandspit: would you say that the company regulations and instructions relative to the operation of the aircraft require the pilot or another member of the [606] crew to advise the passengers that they were making an unscheduled landing?

(Testimony of Dudley S. Cox.)

A. Yes, I would say so, that the passengers should be advised that they are making an unscheduled landing.

Q. You have landed at Sandspit?

A. Yes.

Q. Are you familiar with the length of the runway as it existed in 1952? A. Yes.

Q. Approximately how long is that runway?

A. I judge—I would have to refer to records—I judge about 5,000, 4,500 to 5,000.

The Court: Was that room enough to land if the pilot could have seen what he was doing?

The Witness: Yes, sir.

Q. Do you know whether in January 19, 1952, there was any crash equipment located at the field, or any personnel to operate it?

A. There was none.

Q. And there were no personnel to operate it?

A. No.

Q. What personnel were situated at the airport, if any?

A. There were communications personnel of the Department of Transport.

Q. Are you familiar with the weather at the time of the crash [607] of Flight 324 at Sandspit, British Columbia?

A. Yes, sir, generally familiar.

Q. Would you state what you understand the weather to have been at that time on the morning of January 19, 1952?

(Testimony of Dudley S. Cox.)

A. As I recall, the weather was variable, with the ceiling and visibility varying because of instability, squalls, snow squalls in the area, the visibility going up and down and briefly restricted under snow squall conditions. I think the ceiling was around 1,500 feet, and the visibility three to five miles, or something of that nature, and occasionally restricted to one mile, to the best of my recollection.

Q. Do you recall what the weather en route to Seattle was from Sandspit?

A. Generally overcast for the entire route, with the weather at Seattle, ceiling of, I think 2,000 or 2,500 feet or something like that, and lowering slightly at Portland, and I believe somewhat higher at the south end of Vancouver Island.

Q. Do you recall what the reported visibility was on the morning of January 19, 1952, in the Seattle area?

A. I don't recall that, no, sir. I think it was good, but I can't recall specifically what the reading was.

Q. Assuming the same facts just stated in the hypothetical question, would your regulations require notice to the [608] passengers by any member of the crew of the present location or use of life rafts and life jackets allegedly aboard the aircraft?

A. Assuming this fact as you described it a moment ago?

Q. Yes. A. Not necessarily, no, sir.

Q. Is it your testimony that at no point in the

(Testimony of Dudley S. Cox.)

flight should the passengers be advised as to the location of life rafts and life jackets?

A. Well, I misunderstood you. I thought you were assuming this fact that they had lost an engine. I don't quite understand. Do you wish me to assume this particular fact, they lost an engine over Sitka, and whether the crew should advise the passengers at that point of the emergency equipment, or at any time after departure from Anchorage or before Anchorage?

Q. I will state first, assuming the same hypothetical question, at the time of the loss of the engine, should they be informed as to the location of life rafts and life jackets?

A. Not necessarily, no, sir.

Q. Under what circumstances should they be informed?

A. When the captain feels that there is an actual need for such.

Q. Shouldn't the passengers be informed immediately after takeoff, even before an emergency, of the location of [609] life rafts and life jackets?

A. That is correct. The passengers should be briefed before an over water flight.

Q. Would that be true in January, 1952?

A. That is correct.

Q. And if this wasn't accomplished, then somebody did not accomplish their assigned function, would that be true?

A. If it wasn't accomplished, it should have been.

(Testimony of Dudley S. Cox.)

Q. Did Northwest Airlines in January, 1952, have any regulations covering the conduct and duties of crew members with respect to the safety and rescue of passengers on aircraft flights over water carrying passengers?

A. The safety and rescue?

Q. Did they have any regulations covering the conduct and duties of crew members with regard to the safety and rescue of passengers on aircraft flights carrying passengers over water?

A. The company had safety regulations concerning the passengers and the care of passengers. The rescue of passengers, in the event that rescue is necessary, our instructions are general in that respect, assisting them to board life rafts and that sort of thing, but it doesn't—I don't think our instructions are specific to the point of the actual rescue, because it is beyond the control of the crew under those circumstances. [610]

Q. Were you informed what the temperature of the water was at Sandspit, British Columbia, January 19, 1952?

A. I believe about 38 to 42 degrees. I can't recall exactly.

Q. Assuming a situation in January 1952 whereby a DC-4 aircraft generally described as a forty-passenger aircraft carrying life jackets and life rafts, with forty passengers aboard and three crew members consisting of the pilot, co-pilot and stewardess, wherein the aircraft made an unsuccessful attempt

(Testimony of Dudley S. Cox.)

to land at Sandspit, British Columbia, and crashed into the waters adjacent to the Sandspit airport at a distance of approximately one-half to three-quarters of a mile from shore; assuming further that the aircraft after such crash remained substantially intact; and assuming further that the aircraft remained afloat for a period of from two to five minutes; and assuming further that the water outside the aircraft did not fill the craft for approximately five minutes; and assuming further that the passengers on the aircraft were able to leave the aircraft in approximately two minutes; and assume that the water into which the plane had crashed was approximately twenty feet deep; and assuming further that the water was extremely cold; and assume further that the aircraft crashed at approximately 1:40 A.M. Pacific Standard Time, in total darkness, and that as a result of the crash the lights on the plane were out and that no emergency lighting [611] was available: would Northwest Airlines operating procedures at that time have included any instructions relative to the duties of the crew to advise the passengers as to how to launch the life rafts?

Mr. Koch: Your Honor, I object to this hypothetical question. It assumes fact after fact that is not in evidence, and in many instances it assumes facts erroneously where the evidence is otherwise.

Mr. Riley: I would like Mr. Koch to point out one.

Mr. Koch: If we could go over it, I would try to.

(Testimony of Dudley S. Cox.)

The Court: Is there something else you wish to point out?

Mr. Koch: Simply that it states facts not in evidence, and it is such a long, complicated hypothetical question and assumes so many facts, I would imagine a witness would require time to see it and read it and study it if the Court rules that it is a proper question and it does set forth facts that are in evidence.

The Court: I think the objection should be overruled, and I believe counsel has a right to leave it to the witness, if he can deal with the question as counsel invites him to. Counsel should in good faith state no condition in it that is not already in the evidence or which he has any doubt about ever being in the evidence. With that qualification, the objection is overruled. Do [612] you recall the statement of the question sufficiently to entertain the question phase of it, Mr. Cox?

The Witness: Yes.

The Court: Did you ask him if he had an opinion?

Mr. Riley: I asked him whether or not Northwest Airlines at that time had any instructions relating to the duties of the aircraft crew which would require them to advise passengers as to how to launch the life rafts.

The Court: Under the conditions stated?

Mr. Riley: Under the conditions stated.

The Court: Do you understand the question?

(Testimony of Dudley S. Cox.)

The Witness: Yes, sir.

The Court: Then you may answer it, if you know the answer.

A. There is no specific requirement under those conditions. There is a general requirement on the service of the crew members that they devote themselves to the passengers, as on a passenger liner. In other words, the passenger comes first, to do all you can for his safety and even at the risk of your own life. That is sort of customary in the service of transportation people.

There is one other specific instruction that I could refer to which is in the nature of aircraft over water carrying limited crews, where the instructions to the personnel on the airplane are that they must enlist [613] passenger aid for the launching of certain life rafts, and those are the only instances that I can recall that would be pertinent to your question.

Q. This aircraft was substantially intact, you have been able to determine that as a result of your own investigation? Was it not substantially intact?

A. It appeared so. We observed the top of the fuselage. The tail section was torn off, we thought through a towing operation, but we could see the top of the fuselage and the tops of the wings under the water. It did appear from that view substantially intact.

Q. From your discussions with survivors and other personnel, it was reported that the aircraft

(Testimony of Dudley S. Cox.)

was intact at the time it landed in the water, isn't that correct?

Mr. Koch: I object to his testifying from what survivors told him, as hearsay.

Mr. Riley: I don't believe it should be hearsay when the defendant company was the one that interviewed them and did the investigation, and we do have Mr. Cox, manager of operations for the entire airline.

The Court: Insofar as it appears to state the words, I think the objection should be sustained. You can ask him what he learned the fact to be, if he came to any conclusion as to what the fact was about these conditions.

Q. What other facts did you learn in the course of your [614] investigation which related to what the condition of the aircraft was at the time it crashed in the water?

A. From our observations and discussions with the—I didn't directly ask the survivors myself. I was present.

The Court: It is just a question of what you learned.

A. I learned that the exterior of the airplane was substantially intact, that the interior was—some of the structure inside, the seats, some of them were torn loose and there was some material and supplies carried on the inside, passenger supplies, were floating around and were jarred loose, and that's about all. There was quite a bit of confusion inside,

(Testimony of Dudley S. Cox.)

and some debris. To what extent, we couldn't say.

The Court: Did you or did you not learn that any passengers were physically injured by reason of anything which occurred from the impact resulting from the landing on his body or person?

The Witness: We did not learn directly. We inquired time after time of that. We did not learn that anyone directly died as a result of that water landing. We could not know for sure.

The Court: I mean from personal injuries that come from a blow, an external blow or external force or from the bodily rebound reaction from the application of such force. Did you learn of any personal injuries from that [615] type of a cause of injury?

The Witness: Personal injuries?

The Court: Traumatic is the word I am trying to think of. Did you learn if any passengers sustained any traumatic injuries caused by a blow on their bodies, or the rebound of the body from any sudden stopping or jerking or impact against the body?

The Witness: No, sir, we did not. The best we found was a few minor bruises, but we did not learn of any such.

Q. If the ditching pamphlets and literature which were allegedly stowed aboard the aircraft required the crew to instruct the passengers as to the location of the life jackets, would you state that the crew members, whoever they were aboard the

(Testimony of Dudley S. Cox.)

aircraft, would have a duty to see that the passengers were instructed as to the location of the life jackets?

A. The ditching folder itself was in a tri-language pamphlet describing the location of life vests and flotation gear. The duties of the crew were to see that each passenger had the pamphlet in his hand, to answer their questions as best he could, if he were an American, and to demonstrate if he were a foreigner and couldn't speak the language. With the cabin attendant and the ditching folders, that was the way that was accomplished. [616]

Q. If the ditching pamphlet stated as to life vests, "Life vests are located in overhead racks or under your seat. The purser will instruct you in which of the two locations your life belt may be reached shortly after departure", would you say the crew, purser, stewardess, co-pilot or pilot, would be under an obligation to instruct the passengers aboard the aircraft as to the location of vests in the particular aircraft which was flying?

A. Yes.

Q. If the life rafts were located in a different portion of the cabin than the ditching literature located in the aircraft indicated that the life rafts were located, wouldn't it be the duty of someone to inform the passengers of the difference in location?

A. Well, in the same general area, that is correct. In other words, they wouldn't be forward in the airplane. If they were forward, they should tell

(Testimony of Dudley S. Cox.)

them they are forward, or it should be described. If they are in the same general area, same section of the airplane——

Q. If the life rafts were located aft of the main cabin door behind a curtain, rather than forward of the main cabin door behind the last two seats on the left side of the aircraft, would you say that would impose a duty on the crew to instruct the passengers that the life rafts were located in a different place than shown in the ditching [617] pamphlets? A. If they were——

Q. Just answer the question yes or no.

Mr. Koch: I think the witness should be entitled to give an answer to the question.

The Court: I think he has a right to restrict him. Read the question.

(Last question read by reporter.)

The Court: Would you or would you not say? You should at least give him an alternative.

Mr. Riley: Yes, Your Honor. I would like to modify the question.

The Court: The objection to it, insofar as that is concerned, is sustained, with leave to put it in the other form, "would you or would you not so state."

Q. Would you or would you not state that there was a duty of the crew aboard the aircraft to so instruct passengers as to the different locations of life rafts, as mentioned in my last question?

A. As you outlined, I would not say. I don't

(Testimony of Dudley S. Cox.)

know whether that is affirmative or negative. I would not say it was the responsibility, if they are in the same general location.

Q. Are you saying that if life rafts are placed behind a curtain aft of the main cabin door, rather than forward of the main cabin door behind the last two seats on the left [618] side, are you saying they are in same area?

A. That is correct.

Q. And that it wouldn't impose a duty on the crew to instruct as to the location of the life rafts?

A. That is correct.

Mr. Koch: This is argumentative. He has answered it.

The Court: The witness has intelligently done so. The objection is overruled.

Q. Assuming a situation in January, 1952, whereby a DC-4 aircraft loaded with forty passengers and a crew of three, consisting of a pilot, co-pilot and stewardess, an aircraft with life vests and life rafts located somewhere within it, and the aircraft made an unsuccessful attempt to land at Sandspit airport with one engine feathered, and thereafter crashed into the water adjacent to the Sandspit airport at a distance of approximately one-half to three-quarters of a mile from shore; and assuming further that the aircraft after such crash remained substantially intact; and assuming further that the aircraft remained afloat for a period of time approximately two to five minutes; and assuming fur-

(Testimony of Dudley S. Cox.)

ther that the water from outside the aircraft did not fill the cabin for approximately five minutes; and assuming further that the passengers on the aircraft were able to leave the aircraft in approximately two minutes; and that the water was approximately twenty [619] feet deep and was extremely cold; and that at the time the aircraft landed in the water it was 1:40 A.M. Pacific Standard Time, in darkness; that as a result of the crash the lights on the plane went out: and in the absence of regulations, do you have an opinion as to the ordinary duties of a crew of ordinary prudence of an aircraft under such conditions as to whether or not passengers should be assisted in launching life rafts? A. Yes.

Q. What is that opinion?

Mr. Koch: Just a moment. I must object, and now I have jotted down the points where the evidence is either not in the record or in dispute. There is no evidence with respect to whether or not there was lighting after the regular interior lights went out or not, whether any emergency lighting was put on. In the second place, I don't recall any testimony as to how long it took the plane to sink. The testimony that it took two to five minutes to fill up with water, I don't know where that comes from. It is a question of how soon it filled up, how soon it became a foot, two feet, deep. There has been testimony that the seats were shaken loose from the mooring and that could impair the ability to launch

(Testimony of Dudley S. Cox.)

the rafts. I think there are so many conditions that are not stated in the question itself that the answer could be highly misleading. [620]

The Court: The objection is overruled.

Q. What is your opinion?

A. I have no specific—I would generally say do all you possibly can to launch the rafts, to assist the passengers to don the life vests, to do everything you physically can. That is what I would expect of any crew, myself included.

Q. Mr. Cox, was any other agency in control of the aircraft designated Flight 324 of January 19, 1952?

A. Was any other agency in control?

Q. Other than Northwest Airlines.

A. It was under the jurisdiction of the military, MATS, Military Air Transport Service.

Q. What jurisdiction were they under?

A. They provided certain services, certain services in conjunction with the contract that Northwest had with MATS.

Q. You were paid for each of these flights?

A. Paid by the mile, yes, paid each flight.

Q. As a matter of fact, wasn't the airline paid by the round trip?

A. I couldn't say for sure. I think that is true.

Q. The airline was operating under a basic contract with the United States Air Force?

A. We were the prime contractors for the group of carriers, and we subcontracted to the other airlines, but we were the prime contractors with the military. [621]

(Testimony of Dudley S. Cox.)

Q. Did they provide you from time to time with requests for transportation or for an aircraft for a particular flight?

A. Well, sir, that schedule was set up departing at certain times from Seattle, return flight at certain times from Haneda.

Q. Was the schedule based on round trip from Seattle to Japan and return?

A. That is correct.

Q. Was that the manner in which Flight 324 was operated?

A. Except for operational delays, that is correct.

Q. Did you pay the crew members for Northwest Airlines; in other words, were they in the direct employment of Northwest Airlines?

A. That is correct.

Q. Did the United States Air Force own the aircraft? A. No, they did not.

Q. Did they control your departure times after the aircraft was en route?

A. I think they did then.

The Court: Speaking of Northwest?

Q. Speaking of Northwest, and referring specifically to Flight 324.

A. Perhaps I didn't understand. Does Northwest have the ability to deviate the airplane?

The Court: Did it on this flight control the flight [622] the same as if it had owned the plane?

The Witness: Yes, they had the right to deviate the airplane, for a reason.

(Testimony of Dudley S. Cox.)

The Court: Is it true or not true that the defendant airline obtained the exclusive right to use this airplane for this flight for the purpose of the defendant airline?

The Witness: That is true.

Mr. Riley: May the record show I am withdrawing documents designated as Flight Operations Manual, by Northwest Airlines, from the records on counsel table which were delivered here earlier by defendant's counsel, and I request that these now be marked for identification.

(Flight Operations Manual marked Plaintiffs' Exhibit 31 for identification.)

Q. While these documents are being marked for identification, can you tell us under what authority the Northwest Airlines operations manual is promulgated by Northwest Airlines?

A. Under what authority? It is under authority of the Civil Aeronautics Administration and the certificate under which we operate.

Q. Are you required by Civil Air Regulations and by law to promulgate operations manuals and aircraft maintenance manuals which apply to your operation? A. That is correct.

Q. Are these documents approved by the Civil Aeronautics Board? [623]

A. Yes, that is correct.

Q. And after having been approved, do these documents have the same effect as Civil Air Regulations? A. Yes, that is correct.

Q. And as such, violation of a company-

(Testimony of Dudley S. Cox.)

established policy which has been approved by the Civil Aeronautics Board would then be the same as a violation of a Civil Air rule or regulation, isn't that correct?

Mr. Koch: I object to that question. It calls——

The Court: Overruled. If this witness knows, he may answer.

A. In the manuals are a number of instructions to company personnel that have no origin in the Civil Air regulations and violation of those articles are not necessarily a violation of the Civil Air regulations. Those that are written explaining or amplifying Civil Air regulations, those are considered a violation of Civil Air regulations just as the specific one.

The Court: If not complied with, constitute the same seriousness or lack of it which a like observance or lack of observance would be as to the regulation, is that right?

The Witness: Yes, sir.

Q. As to an air carrier, using the defendant airline as an example, operating in 1952 in overseas operations, what part of the Civil Air regulations would apply to your [624] operations?

A. What part? It would be Part 40 and Part 41.

Mr. Riley: May I state for the record I am withdrawing a document from counsel table brought here by counsel, stated to be Part 41, Certification and Operation Rules for Scheduled Air Carrier Operations Outside the Continental Limits of the

(Testimony of Dudley S. Cox.)

United States, which was produced by counsel in response to a subpoena on file with the clerk.

(Part 41, Civil Air Regulations, marked Plaintiffs' Exhibit 33 for identification.)

(Brief discussion between counsel re Plaintiffs' Exhibit 31 for identification.)

The Court: You may inquire concerning Plaintiffs' Exhibit 31 for identification.

Q. Referring to Plaintiffs' Exhibit 31, are each of the pages attached thereto portions of the Northwest Airlines operations manual or cabin service manual or maintenance manuals?

A. I see no maintenance manual here. I see the others.

Q. Would you indicate what categories, what subjects are covered in those pages attached to what has been marked Plaintiffs' Exhibit 31?

A. That deals with the company procedures, regulations, practices and policies; survival at sea; ditching procedures; general ditching principles, all aircraft; [625] an instrument approach procedure for Sandspit; survival at sea; ocean station vessels, and that's about all.

The Court: On the date of January 19, 1952, did they or did they not, each and all of them, apply to the operations by the defendant airline of its flights?

The Witness: To the best of my knowledge, they did.

Q. Each of the documents contains the effective date and the date was in effect, is that correct?

(Testimony of Dudley S. Cox.)

A. Yes, that is correct.

Mr. Riley: I offer Plaintiffs' Exhibit 31 in evidence. I think each of the categories, the topics covered by the pages in the exhibit, are clearly relevant to the issues here.

The Court: What does the witness call that group of material, flight operations manual? Is that what it is, or something else?

The Witness: Flight operations manual and cabin service manual, instructions to personnel.

The Court: Is there any objection?

Mr. Koch: Your Honor, the issues in this case are pretty well drawn, and there may be some of those regulations, some of the provisions of those manuals, that had application, and I think those should certainly be in evidence; but the one on ocean station vessels, and survival at sea, which deals with procedures for staying [626] alive for protracted periods in the open water and that kind of thing, are just not within the scope of this case, the issues of this case, and the record is cluttered, and make it more difficult to search out the portions of the manual that have application here.

The Court: The objection is overruled. Plaintiffs' Exhibit 31 is admitted. The Court will not consider any part of it on an issue which is not in this case, if some part of it applies to some other issue, as well. We have enough issues in this case to consider, I think, and the Court will not consider issues which are not in this case.

(Testimony of Dudley S. Cox.)

(Plaintiffs' Exhibit 31 for identification received in evidence.)

Q. Would you state, if you are able to tell, what the documents marked as Plaintiffs' Exhibit 32 consist of?

A. This is company regulations, practices and procedures, apparently the same as on Exhibit 31, the aircraft operating certificate, and also the charter flight page that is in the other group, general ditching of all aircraft, survival at sea, ditching principles, ditching procedures.

Q. Are those documents the same as Plaintiffs' Exhibit 31?

The Court: The same type of regulation or direction?

Mr. Riley: I will withdraw the exhibit temporarily.

The Witness: There is attached—— [627]

The Court: There is attached something which the witness wishes to mention in response to your inquiry.

The Witness: The large page attached refers to a Boeing 377 type aircraft.

The Court: Not this type at all?

The Witness: No, sir.

Mr. Riley: I will withdraw the exhibit at this time.

The Court: You may withdraw your offer of it. If you later find it should be withdrawn, you can bring it to the Court's attention.

Q. Referring to what has been identified as

(Testimony of Dudley S. Cox.)

Plaintiffs' Exhibit 33, can you identify the documents contained in that exhibit?

A. Civil Air Regulations, Part 41, Certification and Operation Rules for Scheduled Air Carrier Operations Outside the Continental Limits of the United States. Attached to that are some Civil Air Regulation amendments.

Q. Can you tell the dates of the documents, referring particularly to Part 41 of the Civil Air Regulations, the effective dates of those regulations?

A. The effective date of this particular copy of it, as amended to November 15, 1949.

Q. Are subsequent amendments to that document contained in the file before you there, can you tell?

A. There are amendments in this exhibit, and their dates run [628] from 1950 to 1952, December of 1952, March 1953, etc.

Mr. Riley: The plaintiffs offer Plaintiffs' Exhibit 33 in evidence, if the Court please. This document was produced by counsel and was withdrawn from counsel table. There have been previous discussions of it. I don't believe there are any objections to it.

Mr. Koch: No objection.

The Court: This exhibit is now admitted.

(Plaintiffs' Exhibit 33 for identification received in evidence.)

(Brief discussion among Court and counsel re length of trial.)

(Testimony of Dudley S. Cox.)

Mr. Riley: There was one other item raised by Mr. Koch, referring to 37 USCA 232, which prescribes the basic pay and allowances for members of the armed forces, and he was referring to pay grade E-4 in error. He states it was his impression of the testimony Sgt. Waldrep at the time of his death was a so-called buck sergeant, and we took exception to that, because it was our impression the testimony will show that he was a sergeant first class, which would make him a pay grade E-6. If Mr. Koch would simply agree that a sergeant first class is pay grade E-6, and we will agree a buck sergeant is pay grade E-4, then it is a matter of statute as to what the sergeant's pay would have been at the time of his death. [629]

Mr. Koch: I agree the statute should control whatever the facts may be.

The Court: But you are not agreed as to what the facts are about the grade?

Mr. Koch: My recollection is different from theirs. I could be wrong. Whatever the evidence is with respect to his rank, the statute measures compensation.

The Court: Try to leave no uncertainty about his rank at the time of his death.

Mr. Riley: I agree with Mr. Koch a buck sergeant would be a pay grade E-4, and I want him to agree, without bringing in another witness, that a sergeant first class would be a pay grade E-6.

Mr. Koch: Yes, I believe that would be true.

The Court: Only he does not agree that either

(Testimony of Dudley S. Cox.)

one of these persons for whom the plaintiff sues was a sergeant first class?

Mr. Riley: Yes, your Honor, that is my understanding.

(Brief discussion between counsel for defendant and the Court re withdrawing a document for the purpose of making a photostat. Request denied by the Court.)

The Court: The court is adjourned until tomorrow morning at 9:30.

(Court adjourned.) [630]

The Court: The witness will resume the stand for further interrogation.

Q. At the time of Flight 324, which was ship 601, and serial number 45342, at the time that aircraft crashed at Sandspit because of the fact that the No. 1 engine had been operated in excess of the maximum allowable time permitted by Civil Air Regulations, isn't that a fact?

Mr. Koch: I object to the form of the question, very leading. This is not cross examination.

The Court: Overruled.

A. The records after the accident disclosed that the time was over on that engine.

Q. What does the term "overshot" mean, Mr. Cox? A. Overshot with reference to landing?

Q. Overshot with reference to landing.

A. Actually, I think it probably should be referred to as overshoot. It is in the case of an aircraft that lands too far down the runway to bring the aircraft to a safe stop.

(Testimony of Dudley S. Cox.)

Q. Would you say that is why the pilot of Flight 324 elected to try to go around, because he had overshoot the runway?

A. I don't have an opinion. That could be one reason. There are other reasons, so perhaps——

Q. But that could have been one?

A. That could have been one. [631]

Q. If he had overshoot, and the visibility was reduced to snow flurries to one mile, as the weather was reported at Sandspit on the night of January 19, 1952, had the visibility been better, the pilot probably would not have overshoot the runway?

A. No, sir, I couldn't say that.

Q. It is possible? In other words, it is less likely that he would have overshoot had the visibility been improved?

A. Not necessarily. I couldn't say that specifically. His minimum there is 800 feet, and he was making an approach from north to south, and he must maintain 800 feet until he can see the runway. He hasn't any authority——

Q. But if visibility were impaired, he wouldn't have seen the runway as soon as he would have ordinarily, isn't that correct?

A. I am thinking of a turn around on the north leg of the approach pattern, and as he turns around, he maintains at least 800 feet or above until such time as he can come straight in.

Q. That is the procedure, rule, for that particular airport, that the pilot in making an approach using Sandspit low frequency range, he must main-

(Testimony of Dudley S. Cox.)

tain 800 feet until he has the field in sight, is that correct? A. That is correct.

Q. So that he couldn't go below 800 feet until he was within [632] one mile of the field, is that correct?

A. Not necessarily one mile. I think the regulations say until a straight-in landing can be effected.

Q. But if the visibility was restricted to one mile, and you couldn't see farther than one mile, he wouldn't have been permitted to go below 800 feet until he got within one mile of the field due to the regulations at this field, isn't that correct?

A. That is correct.

Q. If the visibility had been two or three miles or had not been obscured by snow flurries, he would undoubtedly have seen the field before one mile, wouldn't he? A. That is correct.

Q. To that extent he could have made a better approach to the field?

A. I would interject this: that he had three engines, was operating on three engines, and he would not come too low outside the airport because he wants to be sure of effecting his landing. That would necessarily keep him up somewhat higher, for caution.

Q. There is no question but what the aircraft landed at Sandspit because the No. 1 engine had failed?

A. I would put it this way, in my own words: he landed at Sandspit because of the regulation that required him landing at the nearest suitable airport. [633]

(Testimony of Dudley S. Cox.)

Q. But the regulations say he may proceed to the next point of intended landing or the nearest suitable airport?

A. No, sir, that is not our interpretation at that time.

Q. That was your report to the Civil Aeronautics Board as we read it from Exhibit 29 yesterday?

A. That is in the event——

The Court: Ask him a question.

Mr. Riley: I will withdraw the statement and proceed further because time is too limited.

Q. If crash and rescue facilities had been available at the point of landing at Sandspit on the night of January 19, 1952, would you say that some of the deaths could have been avoided and lives saved?

A. Crash and rescue equipment?

Q. Yes.

A. Meaning crash boats and similar things?

Q. Yes.

A. I am sure they could. I couldn't state positively because—well, yes, if they were there, they probably could have saved many lives.

Q. If there had been other and additional personnel at the field, other lives could have been saved?

A. That, again, depends on the equipment available.

Q. It is true none of the rafts were removed from the aircraft after the crash, isn't that right?

A. We couldn't state that positively. Some rafts were recovered. We saw one sticking out the navi-

(Testimony of Dudley S. Cox.)

gator's dome. That was there and it washed up on shore, to my knowledge. I found that one myself.

Q. How long after the crash did that wash up?

A. Three or four days.

Q. At that time, the aircraft had begun to disintegrate due to the tidal action and the weather, isn't that correct? A. That is correct.

Q. And the washing on the sandbar?

A. Yes.

Q. If the passengers had not been instructed in use and location of life jackets and life rafts, wouldn't you say that lives could have been saved if the passengers had in fact been instructed in the use and location of life rafts and life jackets?

A. You say if they were not, and if they were?

Q. Yes. A. I hesitate to answer that.

The Court: Let me suggest this: assuming the answer to both "if's" is in the affirmative, then proceed with the question.

The Witness: If they had not been so instructed and if they were instructed, I think that probably more lives could have been saved. [635]

Q. If Air Sea Rescue facilities had been alerted——

The Court: Let me ask you this: consider that one statement of the "if's" had to be on the facts answered in the negative, and the fact trier found that only one of the "if's" was in the affirmative, what would be your answer to the same question a moment ago? I wish the alternative situation as to the existence of the conditions to be answered.

(Testimony of Dudley S. Cox.)

The Witness: If the alternative were true, if the "if's" were in the negative, then the facts speak for themselves: so many people were saved and the rest lost their lives.

Q. It is true that none of the individuals——

The Court: It is or is it not true.

Q. Is it or is it not true that so far as is known, all the personnel escaped from the aircraft after the crash? A. As far as we know, that is true.

Q. And that those people that were lost were lost due to drowning and exposure?

A. Yes, we believe that.

Q. And is it true or is it not that if life rafts had been used, that the lives of passengers which were lost might otherwise have been saved?

A. I couldn't state that. We think that probably that is a possibility. There is wind and tide and waves and [636] exposure, even under those conditions.

Q. A stewardess would not be expected to be able to life one of these rafts by herself, would she?

A. No, sir, but she is trained to handle those rafts. She wouldn't bodily——

Q. It wouldn't be necessary——

Mr. Koch: The witness had not finished his answer.

The Court: Finish your answer.

A. The stewardess is trained in ditching classes and in their training to operate and handle these rafts, which doesn't necessarily mean that they pick them up and walk around, but they all use the rafts,

(Testimony of Dudley S. Cox.)

can roll them, drag them, in some cases, lift them.

Q. In an emergency situation such as the stewardess aboard this flight was concerned, she would have had—would you say that she would require assistance from other personnel to remove the rafts from the aircraft?

A. That is a likely possibility. She does under such conditions—she is instructed in her training to remove the rafts from——

The Court: It is a question of her ability as an airplane stewardess.

The Witness: No, sir, I couldn't answer that. I don't know what size girl she was.

Q. Under ordinary conditions, the average stewardess would [637] require assistance in removing the rafts from the aircraft, is that a fact or not?

A. I believe that is a fact.

The Court: Can you in this connection describe the size or the weight of these rafts that are being mentioned in these questions, the normal size?

The Witness: About three and a half feet by a diameter of 18 inches, weighing about 100 pounds.

The Court: That is before inflation?

The Witness: Yes, sir. They are packaged in a cylindrical form. They can be dragged. They have handles on both ends, to be dragged or rolled.

Q. How fast can these rafts be inflated when removed from the aircraft?

A. The inflation time is thirty seconds to a minute, somewhere in that category.

Q. Would you say the two rafts in the main

(Testimony of Dudley S. Cox.)

cabin in this crash could have been removed within two minutes of the time of impact?

A. I can't answer the question. I don't know what the damage was in that area.

Q. Assuming an aircraft crashed at Sandspit, British Columbia, at 2 A.M., approximately, in the morning, had forty passengers on board; had two life rafts stowed aft of the main cabin door rather than forward of the main cabin door, [638] and assuming that the aircraft was substantially intact after impact and that all the passengers were able to evacuate the aircraft under their own power: could the life rafts have been removed within two minutes from the time of impact?

A. Yes, sir, if that is a planned ditching, which is where you have a chance to calm the panic. You are trained for that particular purpose, where you plan the operation. In case of a sudden unexpected situation, you are apt to have some serious passenger reaction to that, and that is very difficult to control at times.

Q. Would you say that that passenger reaction would be aggravated from lack of knowledge as to where the life rafts were?

A. Not necessarily. I couldn't answer that. Not in my experience.

Q. Would you say it would ordinarily require more time to remove the rafts from the cabin if the passengers didn't know where they were?

A. No, sir. That is a crew responsibility. The

(Testimony of Dudley S. Cox.)

crew are supposed to handle those situations. That is their responsibility, on board that aircraft.

Q. And still it is a fact under these conditions which we have just described that the crew, the stewardess, in this case, would require assistance from other personnel or passengers? [639]

A. Well, I stated, I believe, that that would be a very practical solution to the problem. That is not necessarily—I mean, if everyone was incapacitated in that area, I am reasonably sure, with her training, that she would roll these rafts out and yank the cord.

Q. Would you say whether or not in your opinion it would be true that if passengers did not know the aircraft was in distress, making an emergency landing in an over-water approach to an airport, they will not be alerted to the necessity of knowing location and use of life rafts and life jackets?

A. If they did not know that the aircraft was in distress? Did you say if they did not know?

Q. Yes.

A. We don't consider that three engine operation is distress as such. If—I'm sorry. Maybe——

Q. I will rephrase the question, and I will ask you whether or not you feel that passengers in an aircraft in an emergency condition who are not informed that they are operating in an emergency condition, that they are making an unscheduled and an emergency landing with an over-water approach to an isolated airport, that they would not then be

(Testimony of Dudley S. Cox.)

alerted to the necessity of knowing the location and use of life rafts and life jackets?

Mr. Koch: I object to the form of the question, [640] because the question refers to emergency condition, and as the witness has testified, as the record shows, there are various kinds of emergencies, each requiring different action on the part of the crew and the captain, and without specifying what he has in mind, the answer is bound not to——

The Court: The objection is overruled.

A. In this particular case, we considered a three engine operation as Flight 324 of that date a potential emergency and not an actual emergency. An actual emergency——

Q. That is not my question.

The Court: Read the question.

(Last question read by reporter.)

A. I am awfully sorry. That they would not be alerted to the position of life rafts and life jackets? This is an assumed situation, with no respect to our particular case, Flight 324. If it is an actual emergency, yes, they should have that information, particularly with respect to the life jackets, not so much, in my opinion, not so much with respect to the life rafts.

Q. Assuming a hypothetical situation, if passengers under those conditions were not informed——

The Court: You mean under the emergency conditions?

Mr. Riley: Yes, your Honor.

Q. If passengers were not informed that they

(Testimony of Dudley S. Cox.)

were making an [641] unscheduled landing because of loss of an engine, they would not feel the necessity of knowing that they should know where the life rafts and life jackets are?

The Court: Is that a question or an argument or a statement.

Q. Isn't that true, or——

Mr. Koch: I wonder if it would be appropriate that the questions refer to either life vests or jackets, since the witness explains his answer——

The Court: The objection is overruled. The witness is a very intelligent person, and he is following the questions, and it is believed by the Court that he will do the best he can, as he is manifesting an effort to do so at this time in answering the question. You may proceed.

(DC-4 operating manual marked Plaintiffs' Exhibit 34 for identification.)

The Court: If you wish the witness to further entertain the question, would you let that be known?

Q. Would you please answer the question, or do you wish it read?

The Court: Read the question.

(Last question read by reporter.)

Q. Is that true or false?

A. That is true in the case of an engine out operation. With an engine out operation and the landing at the nearest [642] suitable airport, the passengers undoubtedly—as the statement read, I think that would be a true statement there.

(Testimony of Dudley S. Cox.)

(NWA interoffice communication marked Plaintiffs' Exhibit 35 for identification.)

Q. In making a three engine approach to any airport, is it true or false that a pilot must always have in mind the possible necessity of taking a wave-off in the event of some unforeseen emergency developing on the runway or during the approach?

A. That is true. He should keep that in mind at all times.

Q. In a three engine operation of DC-4 aircraft, is it true or false that the failure of the No. 1 engine is considered the most critical of any of the four engines?

A. That is true.

Q. Would you explain why that is?

A. With the torque of the motors, the torque and rotation of the propellers, it appears that the No. 1 position is somewhat more critical than the others. Its effect is more noticeable, I should say.

Q. Showing you what has been marked Plaintiffs' Exhibit 34 for identification, can you identify those papers?

A. This refers to a three engine ferry operation.

Q. Are those promulgated by Northwest Airlines?

A. Yes, sir.

Q. Are there any other operations manuals provisions or [643] aircraft manuals provisions maintained by Northwest Airlines which deal with three engine operation of DC-4 aircraft?

A. Three engine power charts.

Q. Would you look at the material you have before you and determine whether those power charts

(Testimony of Dudley S. Cox.)

are there? A. No, sir, they are not.

Q. With the exception of the power charts, does that appear to be those portions of the Northwest Airlines operations manual dealing with three engine operation of DC-4 type aircraft?

A. Yes, sir, this deals with the three engine ferry operation.

Q. Are there any other manual provisions dealing with three engine operation of DC-4's?

A. No, sir, there are not.

Mr. Riley: I offer in evidence Exhibit 34.

Mr. Koch: The witness in identifying the document has explained it only applies to ferry operations. This is not a ferry operation. A ferry operation is when a flight is flown without passengers to take a plane from one point to another. Since his testimony is that the regulations of the company and the CAA require—

The Court: That is enough. Your statements are too long. I will reserve ruling. If you wish to ask any further questions of this witness in view of the objection [644] stated, you may do so.

Mr. Riley: He has stated that there are no other manual provisions governing three engine operations, and I submit it for that purpose, as well.

The Court: This plane is not a three engine operation, is that true or not true?

Mr. Riley: The aircraft at this time was a three engine operation, because the No. 1 engine had been secured and the propeller feathered.

The Court: You will have to show some fact,

(Testimony of Dudley S. Cox.)

either from the face of the instrument itself or else from the testimony, indicating its applicability to the situation alleged.

Mr. Riley: I will not take any more time on it, your Honor.

Q. Mr. Cox, following the crash of Flight 324, January, 1952, you did receive a number of reports from various personnel of the airline? Is that report which you have before you, Plaintiffs' Exhibit 35, one of the various reports submitted to you?

A. Yes, sir, that is correct.

Q. Who is Mr. Allen?

A. He is a flight dispatcher.

Q. Where was he stationed in January 1952?

A. He was stationed at Anchorage. [645]

Q. What does that report which you have, marked Plaintiffs' Exhibit 35, indicate?

A. Well, this is the facts surrounding the departure of the flight and anything that he knows concerning the flight.

Q. If any maintenance or inspection had been accomplished on the aircraft prior to its departure from Anchorage, would that report indicate what action had been taken?

A. No, sir, not necessarily. He might not have been aware of such information. His position is an office dispatcher. If the work is accomplished at the hangar or elsewhere, he might not have that information available.

Q. If the aircraft had been grounded for any report of discrepancy or malfunctioning, he would

(Testimony of Dudley S. Cox.)

have been advised of that as the flight dispatcher, would he not?

A. If it had been grounded, yes, because he is concerned with expediting the departure of the flight. He would not necessarily be told what the grounding was. The mechanic in charge may have grounded the airplane.

Q. Would the pilot's log indicate any reported discrepancy or maintenance action taken with respect to the aircraft? A. At Anchorage?

Q. Yes.

A. On its arrival from Shemya, the logbook should indicate what was done to the airplane.

Q. And the logbooks, if they are in evidence, would show any [646] mechanical action or maintenance action at both Shemya, Tokyo and Anchorage prior to its departure from Anchorage to Seattle? A. That is correct.

Q. Would you say that had engine No. 1 of the aircraft which was Flight 324 on the morning of January 19, 1952, had that engine been thoroughly inspected at Anchorage, that it is probable or possible that the failure of that engine could have been avoided?

A. No, sir. That is not at all possible or probable.

Q. You say it isn't at all possible?

A. If it had been thoroughly inspected, as I understood your question, could this trouble have been eliminated or forestalled? I say that is not at all possible or probable.

(Testimony of Dudley S. Cox.)

Q. Isn't it the least bit possible that a failure could have been detected?

A. It is the least bit, but failures of that nature, a frozen oil cooler, for example, flying in sub-freezing temperatures, the oil cooler freezes, so there is too much pressure, it breaches a line, and the oil comes out.

Q. If the engine were leaking oil?

A. If the engine itself were leaking oil by a crack in the crank case and there is an accumulation of that oil, it can be observed and washed down, and at that point the airplane is grounded.

The Court: We will close the plaintiffs' case in chief at 10 o'clock.

Mr. Riley: Yes, your Honor. While that document is being identified, I would like to ask that Exhibits 7 and 8, which are the letters of administration of the plaintiff in the Gorter case, should be admitted in evidence.

The Court: You ask them to be admitted at this time?

Mr. Riley: Yes, your Honor. The pre-trial document has sufficiently identified them.

The Court: As I advised counsel in the beginning, the order in which the exhibits were dealt with makes it very difficult to refer to the place in connection with whose testimony was anything said or any attempt made to identify in any way those exhibits.

Mr. Riley: Your Honor, the pre-trial order it-

(Testimony of Dudley S. Cox.)

self states that the authenticity is not to be challenged.

The Court: They have not been previously mentioned in this trial, is that true or not?

Mr. Riley: They have not been previously mentioned.

(Letters of Administration marked Plaintiffs' Exhibits 7 and 8 for identification.)

The Court: Do you offer them in evidence now?

Mr. Riley: I do, your Honor.

Mr. Koch: No objection.

The Court: Each of them is now admitted. [648]

(Plaintiffs' Exhibits 7 and 8 for identification received in evidence.)

Q. You did receive several other reports in the course of the investigation following the accident, and one of those came from Mr. Smith, the flight operations officer, is that correct? A. Yes.

Q. The flight superintendent or flight controller?

A. Yes, sir.

Q. Did you receive another of those, the one just identified by you from Mr. Allen, and did you receive one from Mr. D. V. Curry concerning the excess time on engine No. 1 of the aircraft that crashed?

A. Not in the nature of an accident report.

Q. He did submit a detailed report to you, dated February 6?

A. I believe that was a memorandum that we asked for.

Q. It was a fact that the engine which was the

(Testimony of Dudley S. Cox.)

No. 1 engine on Flight 324 had been previously removed in June of 1951 from another Northwest Airlines aircraft because of excessive oil consumption, is that right?

A. I couldn't answer that specifically. I believe that is correct.

Q. Do you have Plaintiffs' Exhibit 36?

A. I have 35.

The Court: Plaintiffs' Exhibit 36 is being handed [649] to the witness.

Mr. Riley: May the record show that these were withdrawn from the records here on counsel table.

The Court: Upon what understanding as to nature of contents do you offer it or deal with it at this time?

Mr. Riley: I will ask the witness to identify them, your Honor.

Q. Would you identify the documents before you?

A. The first page is a schedule prepared by Northwest Airlines Sales Department.

Q. What is the second sheet?

A. This is a transmittal letter from Mr. Pugh, chief accountant, accompanying a voucher which is attached thereto.

Q. Does one of those documents show payment to Northwest Airlines for the services provided by this flight? A. I presume that is correct.

Mr. Riley: I offer Plaintiffs' Exhibit 36 for identification in evidence.

Mr. Koch: Your Honor, I have no objection to

(Testimony of Dudley S. Cox.)

the first part of it. The last page deals with a schedule that became effective subsequent to the accident. I can't see that it has any bearing on the case.

The Court: Do you offer it for that schedule?

Mr. Riley: We will remove the last page.

The Court: The last page will be removed. [650]

Mr. Riley: I have one additional document, if the Court please, which is attached to the pre-trial order and consists of the contract between Northwest——

The Court: That exhibit is admitted. Your time is now up.

(Plaintiffs' Exhibit 36 for identification received in evidence.)

Mr. Riley: There are two additional exhibits which the plaintiff just identified a moment ago. Plaintiffs' Exhibit 35 is a communication to Mr. Cox from Mr. Allen, the flight superintendent at Elmendorf. I offer that in evidence, if the Court please.

Mr. Koch: I have no objection to 35.

The Court: It is now admitted.

(Plaintiffs' Exhibit 35 for identification received in evidence.)

The Court: 34? Are you offering that?

Mr. Riley: I offer Plaintiffs' Exhibit 34, if the Court please. It deals with three engine ferry operations. I offer it for the purpose stated previously, Mr. Cox having stated there are no other manual provisions dealing with three engine opera-

(Testimony of Dudley S. Cox.)

tions of a DC-4 in Northwest operations at the time of the crash.

Mr. Koch: I object, your Honor.

The Court: The objection is sustained. [651]

Mr. Riley: The contract contained in the pre-trial order as Plaintiffs' Exhibit 9 is offered in evidence, having been identified, the largest document attached there.

The Court: It never has been mentioned before and it will now be marked Plaintiffs' Exhibit 9.

(Contract marked Plaintiffs' Exhibit 9 for identification.)

The Court: Is there any objection to it?

Mr. Koch: No, your Honor.

The Court: It is admitted. We cannot take any more testimony.

(Plaintiffs' Exhibit 9 for identification received in evidence.)

Mr. Riley: Thank you, your Honor. As I stated yesterday, in full consideration of the Court's burden of the calendar and the docket, I would like to renew my exception to the Court's ruling, because we have had to rush through.

The Court: The exceptions are allowed with like effect as if everything noted in this connection were being stated at this moment. The only thing the Court would except from the Court's last statement that the plaintiffs' case in chief will have to be rested is you may deal with the marked exhibits. It may be that through some oversight counsel have not asked that they be admitted [652] and

that there would not be any objection to it, and we will spend a few minutes considering that. A-17, marked for identification, has not been received in evidence.

Mr. Riley: I have no need for A-17, your Honor.

The Court: You are not making any offer?

Mr. Riley: No, your Honor.

Mr. Koch: May I inquire what A-17 is?

The Court: I will do that a moment later. I am working on the plaintiffs' case in chief, and I will pursue that until it is completed.

The next exhibit of the plaintiffs which was marked for identification is Plaintiffs' Exhibit 26, while Mr. Lewis was on the stand.

The Clerk: That was rejected, your Honor.

The Court: The next exhibit not admitted which has been marked for identification and no action noted by me in my trial notes is Plaintiffs' Exhibit 32, which I believe was some paper or papers relating to the flight manual.

Mr. Koch: It was withdrawn by the plaintiff, your Honor.

Mr. Riley: Yes, your Honor. I will withdraw the offer of Plaintiffs' Exhibit 32.

The Court: It is withdrawn and returned to counsel.

Mr. Riley: It is my understanding 31 was admitted?

The Court: That is true. [653]

Mr. Riley: Plaintiffs' Exhibit 28——

The Court: 32 is withdrawn and returned to

counsel who produced it, unless counsel who produced it wishes otherwise.

Mr. Koch: It came from the table here, your Honor.

The Court: The Court will now apply as effective the requirement that the plaintiffs' case in chief be now closed.

Mr. Riley: Your Honor had reserved a ruling on Plaintiffs' Exhibit 28, as I understand, or has that been admitted?

The Court: The offer was rejected because of the objection that it was in violation of the provisions of Section 581 of Title 49, and that ruling was made upon the information which the Court then had that it came from the records of the Civil Aeronautics Board or the Civil Aeronautics Administration having such record. If that is not true, I would like to know if it is not.

Mr. Riley: Yesterday we had a lengthy discussion of the authority contruing that section.

(Further discussion re Plaintiffs' Exhibit 28.)

The Court: I will have to let the ruling stand. That is the order of the Court as to Plaintiffs' Exhibit 28. The Court's previous ruling will stand.

Is there any other thing, Mr. Riley, that occurs to [654] you? You may confer with your associate, if you would like to, to see if there are any other procedural points or any other thing that has been overlooked.

Mr. Riley: If your Honor please, I want to direct the Court's attention again to plaintiffs'

motion to strike a portion of the defendant's answer for refusal to obey a lawful subpoena duces tecum. At the time it was originally argued as a motion, the Court's records will show it was continued on call. Counsel at that time stated all the reports would be produced. As to that exhibit which your Honor just finally rejected, the statement of Mr. Cox which was given to the Civil Aeronautics Board, it is our contention that that can be obtained, and that the defendant should be ordered to produce that so that it can be placed in evidence.

The Court: Which is that? I am looking at the pleading.

Mr. Riley: I am moving, if the Court please, to strike the defendant's answer entirely and to impose costs for refusal to make discovery in accordance with my original motion, which is on file before the Court, and the original arguments of which were continued on call.

(Further argument re motion.)

The Court: The Court directs that the production in response to the subpoena duces tecum or prior thereto, [655] prior to the serving of the subpoena duces tecum, that response to the requirements of the subpoena duces tecum respecting that document have been complied with by the defendant.

(Further argument re motion.)

The Court: Based upon the provisions of Section 581 of Title 49, USC, the Court's ruling on that will stand. Is there anything else to be said about these matters by the plaintiff?

Mr. Riley: I have nothing further on that point.

The Court: We will take a short recess, after which we will proceed. I would like the defendant's counsel to consider in connection with the matter of cross examining this witness before he is excused from the stand that if, in respect to the matters and things touched upon in the direct examination by Mr. Riley of this witness, the defendant as a part of the defendant's case in chief intends to go into the same subject matter with this witness, then I suggest to you the very strong propriety that you omit to examine by way of cross examination now this witness as to those matters.

Mr. Koch: I will waive cross examination.

The Court: The Court declares that the plaintiffs' case in chief is rested, and the defendant may after the recess proceed with defendant's case in chief. Those [656] connected with this case are excused at least ten minutes and may now retire.

(Recess.)

The Court: You may proceed in the case on trial.

Mr. Koch: Mr. Cox, will you resume the stand, please?

DUDLEY S. COX

called as a witness by defendant, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Koch): What is your present employment?

(Testimony of Dudley S. Cox.)

A. I am a captain with Northwest Airlines, a flight captain.

Q. Where do you operate from?

A. My usual run is from Seattle to the Orient, over the North Pacific.

Q. How long have you been serving as a Northwest Airlines captain?

A. Since about 1953, for this last time. I have been captain before that.

The Court: May I interrupt to ask did you intend also to say that you are also manager of flight operations for Northwest Airlines with flight personnel supervision? [657]

The Witness: Not at this time, your Honor.

The Court: When were you such?

The Witness: From about 1950.

The Court: Were you on January 19, 1952?

The Witness: Yes, sir, I was.

Q. At that time, as manager of flight operations, where were you located?

A. At St. Paul.

Q. Is that the general office of Northwest Airlines?

A. That is the general office of Northwest Airlines.

Q. How long did you occupy that position?

A. About three years.

Q. Will you trace your service experience prior to 1949?

A. I was chief pilot at Seattle for about five years, and chief pilot for the company on their

(Testimony of Dudley S. Cox.)

northern region, stationed at Edmonton, Alberta; and before that was a captain of Northwest Airlines based at Seattle; and then I was co-pilot for Northwest Airlines before that; and on active duty with the Air Force, about 1941-1945.

Q. Have you had flying experience on DC-4 type aircraft? A. Yes, sir.

Q. Can you estimate the number of hours?

A. Somewhere between three and four thousand hours.

Q. What type of equipment are you flying at the present time?

A. Constellations, DC-7's, DC-6-B's, Boeing Stratocruisers. [658]

Q. As manager of flight operations of Northwest Airlines in January, 1952, did your duties require a familiarity with Northwest procedures, with the operating manuals, and the Civil Aeronautics Administration regulations?

A. Yes, sir.

Q. Are you familiar with the contract entered into between the Department of the Air Force and Northwest Airlines, which was dated September 23, 1950? A. Yes, sir.

Q. Is that a copy of the Northwest Airlines-Air Force contract, Exhibit 9?

A. Yes, sir, it is.

Q. Directing your attention to the portion of that contract on which I have put a metal clip, designated Exhibit A, do you find that portion?

A. Yes, sir.

(Testimony of Dudley S. Cox.)

Q. What does Exhibit A deal with, generally?

A. The services called for under the contract.

Q. To be performed by whom?

A. Performed by the military, the MATS Air Transport Service.

Q. Does that Exhibit A deal with briefing of passengers? Exhibit A is a portion of Exhibit 9. That is the way the contract designates a portion of it. Do you find the portion relating to briefing of passengers? A. Yes, sir, I do. [659]

Q. Will you read that section, please?

Mr. Koch: I don't think he should be allowed to read it. The exhibit will speak for itself.

The Court: The Court will hear him do it, although I wish counsel would have in mind that this Court is always very much pleased if counsel wish to defer their reading until they get ready to produce the whole thing together so far as reading is concerned. It could be done at any time during the trial, or it could be done during argument. During argument, counsel, can refer to physical evidence before the Court like this, the contents of it.

Mr. Koch: It is such a long exhibit that I wanted the particular short portion.

The Court: If you believe, as I understand you do, it will shorten present and future reference to it, you may do that.

Mr. Koch: Thank you, your Honor.

A. "The Commander, MATS, or his duly authorized representative will: 1. Maintain traffic

(Testimony of Dudley S. Cox.)

control and priorities; 2. Load and unload the aircraft and provide ground handling, dispatching and briefing services at no cost to the Contractor.”

Q. To whom is the briefing service rendered?

A. Briefing service is rendered to the passengers carried aboard the aircraft. [660]

Q. What type of briefing did the military give passengers before departure of these over water flights?

Mr. Riley: I object. He is leading the witness. If he knows.

The Court: Be sure you condition it.

Q. If you do know, will you state what type of briefing the Military Air Transport Service gives to passengers embarking on over water flights?

A. The military passengers embarking on over water flights were assembled in one——

Mr. Riley: I would like to have the witness state that he knows what was done.

The Court: Do you know?

Mr. Riley: At the time, January 19, 1952.

The Witness: Yes, sir.

The Court: You may answer.

Mr. Riley: Would you state when and where you were ever attending one of these briefings in January, 1952?

The Witness: I attended none.

Mr. Riley: Did you attend any briefing having to do with Flight 324?

The Witness: No, sir, I didn't.

(Testimony of Dudley S. Cox.)

Mr. Riley: I object to the witness answering the question.

Mr. Koch: Your Honor, this is a contract which covers [661] a military air transport of military personnel to and from the Orient, and this witness was familiar with this contract and the administration of the flight operations. He does have familiarity with the briefing that the contract required and of the facilities at the terminals for that briefing.

The Court: The contract speaks on that, doesn't it?

Mr. Koch: No, it just says they will do briefing. Now he is going to explain what that briefing consisted of.

The Court: He can say, if he knows, what they were instructed to do, but he cannot say what was done in a specific instance if he was not there. If he knows what they were instructed concerning that activity, he can say what he knew.

Q. Did you ever make inspection trips to the Orient where you had the opportunity to observe the military briefing setup? A. Yes, sir.

Q. What was that setup?

A. That was a display of emergency equipment in one locality, for observation by passengers or other interested people, consisting of a life raft, opened, inflated, and the contents of the life raft laid out on the surrounding platform; life vests; emergency flares; emergency K rations; Gibson Girl manual transmitter; and, in general, things

(Testimony of Dudley S. Cox.)

of that [662] nature. These were displayed and labeled for the benefit of military personnel.

The Court: Displayed where, if you know?

The Witness: At the airport, sir.

The Court: What airport?

The Witness: At Haneda, Anchorage, and I can't remember whether I saw one at McChord or not.

The Court: Do you have any recollection about Shemya?

The Witness: No, sir, they were not displayed at Shemya.

Q. You do recall—did you see the display at Haneda Air Base in Tokyo?

Mr. Riley: I would like to have the witness be asked when he made this trip.

The Court: That cannot all be done in one question.

The Witness: Yes, sir. I made the trip over there in the latter part of 1951.

The Court: What month, would you say?

The Witness: It was in the fall, I think. I couldn't be specific on that.

Q. Did you see the display at Haneda Air Base near Tokyo in the fall of 1951?

A. I think that's about the approximate time, and I did see such a display.

Q. Did the display include a life vest, do you know? [663]

A. Yes, sir, it included life vests.

Q. Do you recall what type of life vest it was?

(Testimony of Dudley S. Cox.)

A. No, I don't.

Q. Do you know what instructions accompanied the display of the flotation gear and life-saving equipment that you observed given by the military to passengers embarking on such flights?

A. What instructions were given to passengers?

Q. Yes, briefing instructions.

A. Well, they were told that these articles were carried aboard the airplane.

Mr. Riley: He is quoting now from hearsay. I object.

The Court: Withdraw the question and advise him not to answer hearsay.

Q. You may testify what you know, but not what somebody else told you.

A. I did not attend a briefing session at Hana on this particular session. I did confer with MATS officers in Washington, D. C., and—

Mr. Riley: I am going to object now. He is about to refer to hearsay testimony and what other persons said.

The Court: You cannot say what they said. You can say what you did in bringing about your state of information such as you had about the subject.

Q. Were arrangements made imposing certain briefing duties [664] on Northwest Airlines and certain briefing duties on the military?

Mr. Riley: I object. Mr. Koch is consistently leading the witness.

The Court: Sustained. Ask him what, if any-

(Testimony of Dudley S. Cox.)

thing, was done regarding such-and-such a subject.

Q. What, if anything, was done concerning division of duties with respect to briefing passengers?

The Court: To your knowledge.

A. As the passengers were boarding their aircraft, they were given a pamphlet in which the pamphlet gave general ditching principles, location of life vests and emergency gear, including life rafts, and the passengers were asked to read this ditching pamphlet and to ask questions of the stewardess or crew for any information that they desired in connection with the articles.

Q. At the conference that you referred to in Washington, D. C., between you and other representatives of the airline and representatives of MATS, do you know whether there was any arrangement with respect to the division of briefing duties?

A. I can't answer that specifically. It was part of the contract that the military would do the briefing of its own passengers, and that was all that we really had knowledge of.

Q. Do I understand that in addition to such briefing as [665] may have been——

Mr. Riley: Mr. Koch is leading.

The Court: The objection is sustained. This is a very intelligent witness. You needn't lead him.

Q. When did Northwest Airlines brief its passengers flown pursuant to this contract?

A. As they boarded the airplane.

(Testimony of Dudley S. Cox.)

Q. Where?

A. At either Haneda or McChord Field, at the origination of the flight.

Q. Where did Flight 324 of the 17th of January, 1952, originate?

A. At Haneda Airport in Japan.

Q. With respect to this flight, if that was the point of origin, do you know whether or not briefing would have taken place at that point?

A. That was where the briefing would have taken place concerning the ditching pamphlets for Northwest.

Q. Is the briefing performed by Northwest Airlines done——

Mr. Riley: Mr. Koch is again leading the witness.

The Court: Try to avoid that.

Q. Do you know whether or not Northwest Airlines regulations or CAA regulations provide for and prescribe briefing of passengers?

The Court: Answer yes or no.

A. Yes. [666]

Q. Do you know whether or not the briefings provided by Northwest Airlines to passengers on flights subject to this contract were in accordance with the CAA regulations?

The Court: Answer yes or no.

A. Yes.

Q. Do you know whether or not the Northwest——

(Testimony of Dudley S. Cox.)

Mr. Riley: I would like to object that I think he should be required to state how he knows.

The Court: Counsel does not have to ask him that if he does not want to.

Mr. Koch: I will be glad to.

Q. How do you know that?

A. There was a general amendment to the Civil Air Regulations which left the duties of exactly how to brief the passengers largely in the hands of the airlines. They did insist and consider it good operating practices, both nationally and internationally, to do so. The Civil Aeronautics Administration did not specify this particular type of briefing. They were aware of Northwest practices, Pan American practices, all airline practices concerning this particular thing. The specific part of the regulation said that it will carry a life vest for each passenger and sufficient life rafts to accommodate all passengers on the airplane. I think those were the specific details. The general procedures and briefing were not specified, to the best of [667] my knowledge.

Q. Do you know whether or not this subject was covered in Part 41 of the Civil Air Regulations dealing with flights outside the continental United States.

A. I couldn't quote the paragraph in Part 41. It is my understanding and belief that it is covered within Part 41, which is the foreign operating part of the CAA.

Q. Do you know whether or not the Northwest

(Testimony of Dudley S. Cox.)

Airlines operations manual, Volume C, deals with ditching procedures to be invoked in case the plane has to make an emergency landing?

The Court: Answer yes or no. It is whether you know.

Q. The question is, do you know whether or not the Northwest operations manual, Volume C, covers ditching procedures to be invoked in case of an actual emergency requiring a landing?

A. Yes, there are provisions in the manual.

Q. Do you know whether or not those provisions were carried out in this case?

A. No, they were not carried out in this case.

Q. Do you know why that was?

A. The procedures in the manual are for a planned ditching where some period of time elapses from the declaration of an emergency, so that the plane can be prepared for that, gasoline dumped, people instructed to put on their jackets. In this instance, there was no such time interval at all.

Q. Yesterday you testified that if life rafts were stowed behind the curtain aft of the main passenger door, instead of forward of the main passenger door as described in the ditching folder, that the crew would not have the duty or responsibility to instruct the passengers of the precise location?

A. Yes, sir.

Q. Is that not correct? A. Yes, sir.

Q. Upon what do you base your opinion?

A. Well, first, it isn't the passengers' responsibility to launch the raft. It is the crew's responsi-

(Testimony of Dudley S. Cox.)

bility to launch the raft. The passengers are not bound by that responsibility, but the crew are. The crew are the people that should know where the placement of these rafts are and be able to operate them. That has nothing to do with the passengers.

The Court: That is sufficient.

Q. Do you know what the distance would be between the position of the life rafts described in the ditching folder and their location aft of the main cabin door?

A. Well, it is just a short distance, I think four or five feet. I couldn't be sure of that.

Q. Do you know what crew member has the responsibility for launching the life raft? [669]

A. Any crew member may launch the life rafts, cabin crew or cockpit crew.

The Court: I believe he wishes to know who among those you named have the duty. I think he wishes your answer to show who they are.

A. The stewardess, the co-pilot, the navigator, flight engineer, if carried, purser, if carried, or second stewardess or second male attendant in the cabin.

Q. Who composed the crew of Flight 324 on the 17th?

A. A crew of three, a captain, co-pilot, and a stewardess.

Q. Do you recall the weight of the life raft?

A. I think roughly 100 pounds to 110. I think someone testified to 110 in court.

(Testimony of Dudley S. Cox.)

Q. Do the regulations dealing with launching life rafts and establishing ditching procedures authorize a crew member to obtain passenger assistance, if necessary, if you know?

A. Yes, sir. They suppose that circumstances will arise where passengers are drafted for the purpose of expediting the launching of the rafts.

The Court: In your mind, is there any question as to whether the location of the airport, airfield, at Sandspit is located in America or other national territory?

The Witness: It is located in the Queen Charlotte Islands, which is Canadian waters, part of British Columbia.

The Court: Was that verified later by later investigation [670] on behalf of the defendant?

The Witness: Yes, sir. The accident occurred half a mile offshore.

The Court: Just where the accident occurred?

The Witness: Yes, sir.

Q. Where is Sandspit located?

A. In the Queen Charlotte Islands, about the center island, halfway down the island chain, I would guess, which is about 500 miles north of Seattle, off the coast of British Columbia.

(Sheet, Flight Operations Manual, marked Defendant's Exhibit A-19 for identification.)

(Passenger Manifest marked Defendant's Exhibit A-20 for identification.)

(Order for air transport service marked Defendant's Exhibit A-21 for identification.)

(Testimony of Dudley S. Cox.)

Q. Handing you what has been marked Defendant's Exhibit A-19, will you identify that?

The Court: State, if you know, what it is.

A. This is a copy of air carrier operating certificate, signed by James Douglas, superintendent, flight operations branch, Civil Aeronautics Administration.

The Court: Does it have any other type of heading? Is it something printed and distributed to more than one person by someone? [671]

The Witness: Yes, sir. It is a manual page issued to personnel in Northwest Airlines.

The Court: Will you look at that carefully and see if it is a printed directive or regulation or rule of some sort promulgated by someone, and, if so, who?

The Witness: It is a printed page from a Northwest Airlines flight operations manual which is distributed to Northwest personnel, promulgated by the Civil Aeronautics Authority, which certifies that Northwest Airlines International Certificate No. 301-F is competent to operate internationally.

Q. Does that authorize Northwest Airlines to engage in international air carriage?

A. Yes, sir, it does.

Mr. Koch: I will offer it in evidence, your Honor.

Mr. Riley: This document is nothing more than a copy of a United States Government document, and I don't know that it is anything at all. I don't

(Testimony of Dudley S. Cox.)

think it is the best evidence, and I would object to it accordingly.

The Court: The objection is overruled. Defendant's Exhibit A-19 is admitted.

(Defendant's Exhibit A-19 for identification received in evidence.)

Q. Who prepared the operating schedule which is Plaintiffs' Exhibit 36? [672]

A. It is prepared by the Sales Department of Northwest Airlines.

The Court: State, if you know, what it is. Give it a one-word name.

The Witness: This is an operating schedule, prepared by Northwest Airlines.

The Court: An airline flight operations schedule?

The Witness: Yes, sir.

Q. Did this schedule refer to flights flown under the Air Force contract with respect to which you testified?

A. Yes, sir.

Q. For which period?

A. From November 7, 1951, presumably until revised.

Q. Do you know whether or not this schedule was in force at the time of the accident on January 19, 1952?

A. Yes, sir, to the best of my knowledge, that is correct.

Q. Does that schedule deal with plane No. 601 involved in this accident?

A. Not by 601. This covers the operation of

(Testimony of Dudley S. Cox.)

Flight 324 from Haneda eastbound to the States, and Ship No. 601 was designated as MATS Flight 324. May I make one correction? The effective date of this schedule is November 15th.

The Court: What year?

The Witness: 1951.

Q. I understood your testimony that it covers Flight 324 of the 17th, departing from Tokyo eastward with a destination [673] where?

A. Destination was McChord Field.

Q. What is the schedule of stops?

A. Flight 324 departed Tokyo at 5:00 P.M. daily. Correction, I will read this time in Greenwich time, because it is east longitude.

Q. I am not concerned with time, just the dates and stops.

A. The stops are Shemya, Anchorage, Seattle or McChord, and in this case, Flight 324, the destination is McChord.

Q. And the point of origin? A. Is Tokyo.

Q. So it was a flight from Tokyo to——

A. McChord Field.

Q. Via—— A. Shemya and Anchorage.

Q. It left Tokyo when?

A. This schedule says flight departs Tokyo at 0800 Greenwich civil time. That is 5 P.M. Tokyo time.

Q. What day, year, month?

A. The flight in question, 324 of the 17th, that would be departing 5 P.M. on the 17th of January, 1952, but I believe—the schedule calls for that de-

(Testimony of Dudley S. Cox.)

parture. Flight 324, I believe, was delayed somewhat.

Q. What is Exhibit A-20?

A. This is a passenger manifest. [674]

Q. A-21, please?

A. This is a service order to Northwest Airlines specifying that the Commander of MATS desires 36 flights during the month of January from January 1, 1952, to January 31, 1952, to be performed by Northwest.

Q. And that is issued by MATS, you say?

A. Yes, sir, service order to Northwest Airlines.

Q. Is that like an airplane requisition under the contract?

A. Yes, sir. It specifies the contractor, the make, DC-4, and/or cargo aircraft available to the United States for this number of flights.

Q. What is the number of that document?

A. Service Order No. 19, Contract No. AF 33 (038) 14678.

Q. Does that document have reference to Flight 324 of the 17th?

A. Well this document does not say how the flights will be called. It simply specifies the number of flights, the aircraft operating flight schedule is then prepared on the basis of this service order, and the flights numbered 323, 324, whatever the case may be.

Q. Is that service order issued under the provisions of the Air Force — Northwest Airlines contract?

A. Yes, sir.

(Testimony of Dudley S. Cox.)

Mr. Koch: I offer it in evidence, your Honor.

Mr. Riley: No objection. [675]

The Court: That is now admitted in evidence, being Defendant's Exhibit A-21.

(Defendant's Exhibit A-21 for identification received in evidence.)

Q. Handing you what has been marked Defendant's Exhibit A-20, what is that?

A. This is a passenger manifest, air passenger manifest.

Q. Who prepares the air passenger manifest?

A. The representatives, MATS Air Transport Service.

Q. Does it relate to Flight 324 of the 17th?

A. Yes, sir. This is the passenger manifest of Flight 324 of the 17th.

Mr. Koch: I offer it in evidence.

Mr. Riley: No objection.

The Court: Admitted.

(Defendant's Exhibit A-20 for identification received in evidence.)

The Court: For my convenience, will you give a name to A-21?

The Witness: Service order requisition for services under the contract No.—

The Court: Do counsel agree on a one-word name for that paper, A-21?

Mr. Koch: Aircraft service order.

The Court: Order from whom? [676]

Mr. Koch: From the Military Air Transport Service to Northwest Airlines.

(Testimony of Dudley S. Cox.)

The Court: Would you say it is a MATS aircraft service order?

Mr. Riley: That is the designation, your Honor.

Q. Mr. Cox, what is a flight plan?

A. A flight plan is a plan of action by the pilot regarding the flight he proposes to make, the times en route, the amount of gasoline he will burn, and the time he expects to make good from the forecasts at his disposal.

Q. There are a number of papers attached together to A-3. Are they all part of the flight plan?

A. With the exception of the aircraft service check. A copy of this check is given independent of the flight plan, which is attached to the papers subsequently by the pilot.

Q. Will you explain what each of the components of the flight plan is?

A. The first attachment is a cross section of the weather expected to be encountered en route between Elmendorf and Seattle, giving a cross section, the cloud formations, the ceilings and the winds and what other information is pertinent, fronts, icing conditions. On the reverse side of that is a line on a map from Anchorage to the Seattle area. The black line shows in general the path of the airplane on this map type, whatever type it is. The next [677] sheet is the flight plan proper, which specifies the aircraft number, the flight number, and the NC number. That is the number of the aircraft certificate, Civil Air certificate. There are the signatures of the people involved in clearing this flight,

(Testimony of Dudley S. Cox.)

which would be the flight dispatcher, and the captain, and the times at the check points he expects to make good for the entire flight, plus the alternates prescribed in the clearance and the amount of gasoline that he expects to have on board or he does have on board and expects to use for the duration of the flight.

The next page is a weather sequence of weather which gives the spot weather sequences at various stops, and that spot sequence means an observation, a weather observation taken at a particular time, and the ceiling, visibility, temperature and dew point and wind conditions at that time, and these are done hourly. This is an hourly sequence.

The next is a forecast prepared by Northwest Airlines meteorologist which gives winds aloft, terminal weather synopsis, that is, the general weather conditions, and the en route weather and terminal weather, anything else that may be of interest, which would include turbulence or icing conditions. Next, the aircraft service order, which for the pilot's benefit normally consists of balancing out [678] the fuel added and the oil added to see he has the proper amount of fuel aboard which he specifies in his flight plan.

Q. Who makes up the flight plan?

A. The captain of the flight makes the flight plan out.

Q. Do others participate in its final acceptance?

A. Yes, sir. The flight dispatcher concurs and agrees, and he participates. The signature of both

(Testimony of Dudley S. Cox.)

the flight dispatcher and the pilot appear on the flight plan. Both concur that the flight is safe and can be made, and they are agreed in the amount of fuel carried, a route to be flown, etc. There is another individual involved in this case, that is the receiving flight dispatcher. Between Seattle and Anchorage, the route is divided into two dispatch areas, roughly, Annette Island is the boundary line. The receiving flight superintendent has to specify the amount of fuel he wants over the boundary of his district before he will receive the flight, and his name also appears in the flight plan. It is typed; it isn't signed.

Q. The flight dispatcher at the place where the flight plan is made up is who?

A. That is the originating flight dispatcher. In this case, that was Elmendorf.

Q. And the other flight dispatcher you refer to is in Seattle? A. Seattle, yes, sir. [679]

Q. Do I understand you correctly that those two flight dispatchers and the pilot must be in agreement before the flight plan is acceptable?

A. Yes, sir.

Mr. Koch: Will you hand the witness Exhibit A-4 from the pre-trial order?

The Court: Do you wish it dealt with here in this trial?

Mr. Koch: Yes.

The Court: If so, it is necessary to have another exhibit number here, the next defendant's exhibit

(Testimony of Dudley S. Cox.)

number. I wish it marked Defendant's Exhibit A-22.

(Weight and balance manifest marked Defendant's Exhibit A-22 for identification.)

The Court: First, I would like you to state, if you know, what sort of thing that is, having in mind the character of its information.

The Witness: This is a weight and balance manifest concerning Flight 324 of the 17th, departing Elmendorf, which specifies——

The Court: That is sufficient. Does it relate to cargo or passengers on board?

The Witness: Both, yes, sir, by weight.

Mr. Koch: I will offer it in evidence.

Mr. Riley: I have no objection. [680]

The Court: Admitted.

(Defendant's Exhibit A-22 for identification received in evidence.)

Q. How many passengers does the weight and balance manifest show were aboard, or does it show that?

A. It shows there were forty passengers aboard.

Q. Does that include the crew?

A. No, sir, it does not include the crew in that compilation. The crew is added in another section. It shows a crew of three.

Q. Does that exhibit show the maximum loaded capacity of the plane? A. Yes, sir, it does.

Q. What is that? A. 71,800 pounds.

The Court: Maximum loaded weight?

(Testimony of Dudley S. Cox.)

The Witness: Maximum gross weight for take-off, maximum allowable gross weight.

Q. Does this exhibit show the weight of the plane load on takeoff? A. Yes, sir.

Q. What does that show? A. 68,275.

Q. Can you determine from that exhibit whether or not the weight was distributed in accordance [681] with the CAA and Northwest Airlines regulations?

A. Yes, sir. As far as I can see, the form is correct in the way it is made out, and the numbers appear to be correct. The index—I couldn't say that they are correct, but the form appears to be correct in all respects.

Q. Do you know whether or not Exhibit A-5 contains a record of communications received by the Seattle dispatch office of the flight in question?

A. Yes, sir, it does.

Q. What communications are contained in that exhibit, I mean, communications received over what circuit?

A. Well, what information is contained here? It is the flight plan information and the position of the aircraft as it departed and proceeded towards Seattle.

The Court: As indicated by what?

A. Messages.

The Court: Messages between whom, if you know?

A. Between the aircraft and the ground station.

(Testimony of Dudley S. Cox.)

The Court: The ground station with which it at the moment was in contact?

A. Which it was in contact with.

Q. With respect to the messages contained on that exhibit, what is the source of them as far as Northwest Airlines is concerned? How does Northwest Airlines receive those messages? [682]

A. Northwest receives them from the stations, the Civil Air Circuit, who received the message from that airplane. That is in turn relayed to the——

The Court: Such as what stations on this route?

The Witness: Annette Island, Yakutat, Yakutaga, Cordova, Anchorage.

The Court: Do you see any such station identification in connection with those messages on that exhibit?

The Witness: Yes, sir.

Q. And the Civil Air stations you refer to, what do you mean by Civil Air stations?

A. Stations operated and run by the United States Government Civil Aeronautics Administration.

The Court: Look at those casually. What significance does the information disclosed by that exhibit have to you as an experienced pilot?

The Witness: It tells me that the flight plan of the airplane was made and transmitted properly.

The Court: It means that the flight plan and the normal flight, as according to the regulations

(Testimony of Dudley S. Cox.)

and the directions under which the flight was moving, were all being accomplished?

The Witness: Perfectly normal manner, yes, sir.

The Court: Does it show anything else of importance?

The Witness: Yes, sir, that the fact that the [683] normal course of events was interrupted by the feathering of the No. 1 engine, on a message when he was about abeam of Sitka.

Q. Along the same line, does it have any further significance with reference to what was done when the engine was feathered near Sitka?

A. The captain of the flight advised that he was proceeding to Sandspit, and the other—from there on, the significance to me was that he was proceeding on three engines, and he did account for his times as he proceeded on three engines from that point, and in checking those times, it appears that the aircraft was operating normally on three-engine power, in a perfectly normal manner, and I could see nothing that was any undue delay or any other complicating factors in its progress after it had lost the No. 1 engine to Sandspit.

Q. Do you know whether or not that exhibit has any messages dealing with communications between the flight superintendent in Seattle and the pilot with respect to his course of action?

A. Yes, sir. He advised that he was proceeding towards Sandspit. There is a message from Seattle flight control asking if he intended to land at Sand-

(Testimony of Dudley S. Cox.)

spit. There is another message that he was estimating over Sandspit at a certain time.

The Court: Do you know what that was?

The Witness: Yes, sir. He estimated over [684] Sandspit 0928, that is Greenwich civil time.

The Court: Would you tell us what time it was at Sitka or our daily clock time?

The Witness: Three minutes after midnight, sir.

The Court: Over what place at three minutes after midnight?

The Witness: Let me check this once more. Pacific Standard Time would be three minutes after midnight, and that would be January 19th.

The Court: That is January 19th, our calendar day, is that right.

The Witness: Yes, sir.

The Court: 1952?

The Witness: Yes, sir.

The Court: What is it that they show?

The Witness: There is a message from the flight, the captain of the flight: "No. 1 engine feathered. Proceeding to Sandspit. Captain, NWA 324."

The Court: Being over Sandspit at three minutes after midnight—what is it that shows that? Is it a message?

The Witness: It is a message filing time on the message from the aircraft.

The Court: Do you not know who it is from? Is there anything to indicate who it is from, the flight captain or who? [685]

(Testimony of Dudley S. Cox.)

The Witness: The message simply states it is from the captain of Northwest 324.

The Court: That means the flight captain?

The Witness: Yes, sir.

The Court: The aircraft over Sandspit at three minutes after midnight, is that right?

The Witness: No, sir. You asked, I thought, what time it was abeam Sitka. I said three minutes after midnight. He estimated over Sandspit at 0928, which would be 1:28 Pacific Standard Time.

The Court: A message from the flight captain that the aircraft was over Sandspit?

The Witness: Estimating over Sandspit at 1:28 A.M.

Q. When was that message sent?

A. That was sent when he was abeam or southwest of Annette Island.

Q. Then what time did he send the message estimating over Sandspit at 1:28?

A. At what time?

Q. At what time was that message sent?

A. That was sent at 0903. That would be 1:03 A.M. on the 19th.

The Court: Was that an estimate of probable arrival over Sandspit?

The Witness: Yes, sir. [686]

The Court: I thought you previously indicated you had a message saying when the plane actually was over Sandspit.

The Witness: No, sir, I said the captain's estimate of his time over Sandspit.

(Testimony of Dudley S. Cox.)

The Court: Have you any message there or record as a part of that exhibit which you now have, A-5, which shows the time when it was over Sandspit?

The Witness: The only message of any significance was when the aircraft was in the area of Sandspit, and there was a message to Seattle from Annette Island advising Northwest 324 landing at Sandspit. That was at 0943, at 1:43, 15 minutes after his estimate of being over the station.

The Court: How long was it before the last message received from the airplane indicating where it was?

The Witness: That was forty minutes later.

Mr. Riley: If the Court please, may I interrupt a moment? Mr. Cox, what time did the aircraft report it lost its engine when it was abeam Sitka?

The Witness: That was three minutes after midnight.

Mr. Riley: He reported then he was proceeding to Sandspit?

The Witness: That is correct.

Mr. Riley: He reached Sandspit at 1:48, is that correct? [687]

The Witness: No, sir, that is not the way I have it from the message.

The Court: You may proceed, with a greater rapidity than the Court's questioning.

Q. Does the flight position log represent all the communications between the plane and the ground?

A. Not necessarily so, no, sir.

(Testimony of Dudley S. Cox.)

Q. What other communications are there?

A. Landing clearance; tower clearance; takeoff clearance; a time given to the local operator of his departing station, for example, tower clearance. There would be quite a bit of communication with the tower.

Q. Do you know whether or not all messages sent from an airplane are relayed by the CAA system, or not?

A. All messages sent from the aircraft of an operational nature. There is a procedure set up that such operational messages shall be forwarded without the aircraft captain addressing the message. He doesn't have to address these operational messages.

The Court: Is it or is it not depending on the priority of the message? In other words, if you have two messages at the same moment, you would have to choose which one to send first?

The Witness: Regulations prescribe the priority of those. [688]

The Court: Would you look at that record and tell the Court, if you can, what it indicates to you was the time of the arrival, actual time of arrival, of that aircraft over Sandspit?

The Witness: This does not indicate specifically the time.

The Court: What is the nearest thing to it, as best you can inform yourself by looking at that exhibit?

The Witness: His estimate of his time over, and

(Testimony of Dudley S. Cox.)

the further message at fifteen minutes later saying he was in the vicinity and expecting to land.

The Court: What time was that?

The Witness: That was at 9:43, at 1:43 A.M.

The Court: At 1:43 A.M., the captain messaged that he was what?

The Witness: It was a message at 1:43 to Seattle from some source of information, probably the radio operator at Sandspit, that the airplane was landing at Sandspit, at 1:28, which was the captain's estimate when he was over southwest Annette.

The Court: Did somebody at Sandspit at 1:43 message to Seattle that the airplane was over Sandspit?

The Witness: That is our——

The Court: Is that your information from that exhibit?

The Witness: That is the only message here that says—— [689]

The Court: You may proceed.

Q. Do you know whether or not the flight had had clearance in order to land at Sandspit?

A. Well, he must have clearance to land there, yes, sir.

Q. Are there communications between the flight and the Sandspit radio control?

A. Yes, sir, there are communications checking the weather and wind.

Q. From that exhibit which you have in front of you, will you examine the messages from the

(Testimony of Dudley S. Cox.)

flight and the messages from the Seattle flight superintendent and tell me what significance those messages have in terms of such collaboration between those two with respect to landing at Sandspit?

The Court: Suspend your answer to that question until after lunch.

(Brief discussion re length of trial.)

The Court: The Court is recessed until 1:30.

(Recess.)

The Court: You may proceed.

Mr. Koch: I will strike the question before recess.

Q. Mr. Cox, when Flight 324 of January 17th feathered the No. 1 engine, did an emergency arise under Northwest Airlines and Civil Aeronautics Administration regulations?

A. Yes, sir, a potential emergency arose.

Q. Are there CAA or Northwest Airlines [690] regulations relative to landing which become applicable upon feathering an engine? A. Yes, sir.

Q. What were they at that time?

A. That the aircraft shall land at the nearest suitable airport.

Q. Referring to Plaintiffs' Exhibit 21, the third page under the heading "Company policy for Engine-out Operation", is that paragraph applicable under the circumstances when this aircraft lost one engine? A. Yes, sir.

Q. Would the provisions of the company policy for engine-out operation appearing on page 3 of

(Testimony of Dudley S. Cox.)

Plaintiffs' Exhibit 21 be applicable to a potential emergency only, or also to an actual emergency?

A. To a potential emergency.

Q. Not to an actual emergency?

A. Not to an actual emergency.

Q. Would you say that an actual emergency did or did not exist when the No. 1 engine on Flight 324 of the 17th was feathered?

A. An actual emergency did not exist.

Q. Referring again to company policy for engine-out operation appearing on page 3 of Plaintiffs' Exhibit 21, subpoint b, did the pilot know the altitude of the aircraft and the aircraft weight and usable fuel at the time of stoppage? [691]

A. Yes, sir, he did.

Q. Did the Seattle flight superintendent have that information? A. Yes, sir.

Mr. Riley: I object to that. That is not the best evidence. Mr. Smith is still here and can testify to that.

The Court: That is sustained.

Mr. Koch: That is an exhibit in the case, your Honor, and we are referring to exactly what was in the flight plan. There is already testimony that the flight plan was approved specifically by the pilot, the Seattle and the Anchorage flight superintendents.

The Court: In view of the form of the question and the subject matter of the question, the objection is sustained.

(Testimony of Dudley S. Cox.)

Mr. Koch: May I rephrase the question, your Honor?

The Court: You may.

Q. Do you know whether or not the Seattle flight superintendent had knowledge with respect to the altitude, the aircraft weight and the fuel on board at the time the engine was feathered?

Mr. Riley: I object, for the same reasons. He can only base such a conclusion on something which has been told to him from Mr. Smith.

The Court: You can ask him what was done to give the knowledge. You cannot state whether he had the knowledge or not. [692]

Mr. Koch: I will rephrase the question.

Q. Do you know whether or not there was available to the Seattle flight superintendent information with respect to the altitude, the aircraft weight and the usable fuel on board at the time the No. 1 engine was feathered?

The Court: Answer yes or no.

A. Yes, sir.

Q. What was the source of that information?

A. The aircraft altitude, by a series of radio messages from the airplane.

The Court: To whom?

The Witness: To the Civil Air radio stations, and relayed from that point to the Seattle dispatch office. The aircraft weight——

The Court: Was that man there one of those sources?

(Testimony of Dudley S. Cox.)

The Witness: Yes, sir. He was at the Seattle dispatch office.

The Court: Was he on duty at the time, to your knowledge?

The Witness: Yes, sir, he was on duty. The aircraft weight, by calculation extracting the total gross weight at takeoff plus the hours in the air at which fuel is burned in pounds. Everyone has these tabular forms or power charts so that the air-[693] craft's actual weight, or approximately so, is arrived at by the dispatcher, and that is his responsibility and duty to keep aware of those things.

Q. Is usable fuel on board subject to the same type of calculation?

A. Subject to the same type of calculation.

Q. Do you know whether or not the Seattle flight superintendent had information available to him in Seattle with respect to weather conditions and the terrain en route and the possible landing points?

A. Yes, sir, he did.

Q. Did the pilot have such information available to him?

A. Yes, sir. He had a forecast at the flight's origination point and additional forecast transmitted to him from the Seattle meteorological, Northwest meteorological service in Seattle to the airplane, transmitted by radio.

Q. What was the source of the flight superintendent's information, available information on that point?

A. It was from the hourly weather sequences available to him from the CAA circuits in the of-

(Testimony of Dudley S. Cox.)

fice at Seattle. They are on teletype and they come in each hour, plus the Northwest meteorological station is adjacent to—in the same office with the dispatcher.

Q. Was there also a weather forecast on the flight plan?

A. Yes, sir, there was a weather forecast on the flight plan. [694]

Q. Was that available to the Seattle flight superintendent?

A. Yes, sir, because part of it was from the same circuits, the same source.

Q. What was the source of information in sub-point d with respect to air traffic congestion en route and the various available airports?

A. That was known to both. That was known to the pilot, and actually, it isn't applicable to any great extent. It was a known factor, yes, sir.

Q. From what source?

A. From air route traffic control. There is a section from the Vancouver center in the Seattle office, as well as the CAA circuits here in Seattle.

Q. With respect to point e, did the pilot have familiarity with the airport and surrounding terrain?

Mr. Riley: I object. Again, he is calling for something he can't know about.

The Court: The objection is sustained.

Q. Did the Seattle flight superintendent have available to him such information as pertinent to

(Testimony of Dudley S. Cox.)

the pilot's familiarity with the airport and surrounding terrain?

Mr. Riley: I am going to object again. I hate to keep making objection after objection, but this is not the best evidence. The flight superintendent should testify to whether or not this information was available. [695]

The Court: To him?

Mr. Riley: Yes, and he is asking Mr. Cox if the flight superintendent knew.

Mr. Koch: Not if he knew.

The Court: You may ask him in what way it was made available. The objection is sustained for the time being. You may ask him what the availability means were.

Q. What was the nature of the information with respect to the pilot's familiarity with the airport and surrounding terrain which was available to the flight superintendent in Seattle?

The Court: If you know.

A. Yes, sir. That he was qualified over the route under the Civil Air regulations and could not be dispatched over the route unless he was qualified as a captain, first pilot, over the route, and being so qualified, it is necessary that he know the terrain and the facilities on the route, and the dispatcher, knowing that he is qualified——

The Court: The objection goes to this statement, and it is sustained with reference to what he knew. You do not know he knew. He may have been over the route a thousand times and might not know

(Testimony of Dudley S. Cox.)

any more about this particular spot than I know now or I knew before this case began.

Mr. Koch: Is the answer with respect to the [696] sources of information permitted to stand?

The Court: All of it will stand except where he said something about what he knew or might have known.

Q. With respect to point f, what was the source of information with respect to airport safety facilities, crash and fire-fighting equipment, and the availability of such information to the pilot and the Seattle flight superintendent?

A. There was no fire-fighting and crash equipment at any station between Seattle and Anchorage. There was a Coast Guard sub-station at Annette Island. That information was known to both parties.

Q. How do you know that?

A. From the assembly of information prepared by Northwest Airlines on all airports and which the dispatcher—this is available to the dispatcher and the pilot as to what the facilities are at each airport.

Q. Is it contained in Northwest Airlines operations manuals?

A. Yes, sir, I believe that is correct.

Q. Are copies of Northwest Airlines operations manuals containing such information kept aboard Northwest aircraft?

A. Certain manuals are kept aboard Northwest Airlines aircraft, yes, sir.

Q. Would manuals containing the information

(Testimony of Dudley S. Cox.)

with respect to crash and fire-fighting equipment be kept aboard Northwest Airlines aircraft? [697]

A. No, sir, I don't believe they would be kept aboard the aircraft. They would be in the possession of the pilot.

Q. Do you mean that they would be on the plane, but in the pilot's possession?

A. That is correct. The manuals are issued to the pilots and he has these manuals in his personal possession and is required to carry the manuals.

The Court: Suppose he gets on board the plane and finds he doesn't have them, that he changed his jacket before he went aboard and it was in the other garment he took off and not in the pockets of the one substituted for it?

The Witness: The manuals are about so size (indicating) and so thick (indicating).

The Court: Are they ever kept on board, an extra copy of the manuals ever kept aboard the airplane to meet some emergency of the kind I mentioned?

The Witness: No, sir, they are not. There are two pilots, and both have the same manuals aboard.

Q. Are those same manuals in the possession of the flight superintendent at Seattle?

A. Yes, sir.

Q. With respect to subpoint a, the nature of the malfunctioning and possible mechanical difficulties that may be encountered if the flight is continued, was that information known to the pilot? [698]

A. Yes, sir.

(Testimony of Dudley S. Cox.)

Q. Do you know whether or not it was communicated to the Seattle flight superintendent?

A. Yes, sir.

Q. Was it? A. Yes, sir, it was.

Q. Do you know whether or not the Seattle flight superintendent caused additional weather reports and weather forecasts to be transmitted to the flight? A. Yes, sir, he did.

Q. Under subpoint 2 under this heading on page 3, Plaintiffs' Exhibit 21, will you read that sentence?

A. "Upon reaching an agreement with the captain as to which is the nearest suitable airport, the flight superintendent shall clear the flight to that airport. Note: In the event two airports are considered suitable and as safe, clearance shall be made to the nearest in point of time."

Q. With respect to the material you have just read, what was done between the Seattle flight superintendent and the pilot of Flight 324 of the 17th?

Mr. Riley: I would like to object again. This is going into the same matter, asking him what Mr. Smith did, when Mr. Smith is here and can testify better than Mr. Cox as to what he did. [699]

The Court: If he was not there, and did not see a handwritten statement as to the matter, the objection is sustained.

Mr. Koch: I am referring to the exhibit that the witness had before lunch containing all the messages, and those messages outline——

(Testimony of Dudley S. Cox.)

The Court: Those messages show for themselves, and counsel can read that, and if you are asking what is said as part of the contents of that exhibit, you should at least ask him to turn to the exhibit and point out something. Personally, I think the best way to do that is for counsel to do it at the proper time, but I will not deny you the right to do it in the alternative way that I have suggested as proper; namely, that you should ask him to point out what in that exhibit such-and-such, what it is relating to what.

Q. Handing you Exhibit A-5, will you refer to the messages exchanged between the flight and the Seattle flight superintendent bearing on the issue of landing at the nearest suitable airport?

A. Referring to them, yes, sir.

Q. Will you read the messages that apply to his decision?

A. Yes, sir. At 12:03, "Northwest Airlines, No. 1 engine feathered proceeding to Sandspit. Captain, NWA 324." At 12:29, "Northwest 324, oil cooler [700] No. 1 engine broken proceeding to Sandspit."

Message from Seattle at 12:40, "Advise if landing at Sandspit or proceeding to Seattle. Seattle weather okay."

The forecast message at 12:49 giving the amended forecast, terminal forecast your arrival, which gives the weather at Sandspit. Shall I read the weather?

Q. Yes.

A. The Sandspit weather, "2,000 broken overcast occasionally 1,000 overcast, one mile, light

(Testimony of Dudley S. Cox.)

snow. Port Hardy, 3,000 overcast, occasional rain and snow. Annette Island, 1,500 broken, occasionally 700, obscured, one mile, light snow showers. Comox, Pat Bay, 5,000 broken. Seattle-Tacoma, 2,000 broken, 4,000 overcast. Portland, 1,200 overcast.

Q. Are there further messages that bear on this subject?

A. There is an additional message.

Mr. Riley: Would the witness state when that terminal forecast was rendered to Flight 324?

The Witness: Filing time of the message is 12:49 Pacific Standard Time. The message when the flight was over the check point southwest of Annette Island, where he again states, "Estimating Sandspit at 9:28", and that was filed at 9:03. Correction, at 1:03.

Q. What time is that in Pacific Standard Time?

A. 1:03 A.M.

Q. Estimating? [701]

A. Sandspit at 1:28. Then the message noted by the Seattle dispatch office at 1:43, that "Annette advises Northwest 324 landing at Sandspit."

Q. In your opinion, Mr. Cox, did the Seattle flight superintendent clear this flight to Sandspit?

A. Yes, sir. There was an agreement, an acquiescence in the clearance of the flight to Sandspit.

Q. What is the proper procedure to be undertaken if it becomes necessary to feather an engine?

A. The proper procedure for the pilot is to go ahead with the feathering operation, feather the

(Testimony of Dudley S. Cox.)

engine, and notify the nearest dispatch office or nearest control authority, if a dispatch office cannot be reached, that he has feathered the engine and proceeding on.

Q. What is the effect of a broken oil cooler?

A. That is loss of oil in the engine, and the engine will eventually freeze up if it doesn't—it is like a car. If it runs out of oil, the engine will freeze and cause internal damage to the engine.

Q. Could you tell me whether or not it is the function of the oil cooler to cause oil to pass from the cooler to the engine?

A. The function of the cooler itself is to regulate the temperature of the oil which the engine uses, keep it within tolerable limits. [702]

Q. If the oil cooler breaks, what happens to the oil?

A. If it breaks, you start losing oil from the cooler, from the break.

Q. Handing you Plaintiffs' Exhibit 25, do you see a blue ink circle that was put around there by an earlier witness?

A. Yes, sir, I do.

Q. What is inside of that circle?

A. That is the oil cooler housing, the housing of the oil cooler itself.

Q. Where in respect to that oil cooler housing is the No. 1 engine?

A. It is attached to the No. 1 engine, on the lower side of the No. 1 engine power package.

Q. From the pilot's position in the cockpit,

(Testimony of Dudley S. Cox.)

would it be possible to determine whether a loss of oil was due to a broken oil cooler?

A. From the cockpit, you can see this oil cooler, and you can see oil in that vicinity, and if oil is there, you suspect that that is the broken oil cooler line and that is the component parts of the oil cooler are housed inside this housing.

Q. Would you be able to tell what part of the oil cooler was broken?

A. No, sir, you would not.

Q. Are all components of the oil cooler in that oil cooler housing?

A. Are all the components of the oil cooler in the housing?

Q. Yes. A. Yes, sir, they are.

Q. When an oil cooler breaks or becomes un-serviceable in flight, is it or is it not necessary at that point to feather the affected engine?

A. Well, it is necessary to feather the engine. Otherwise, you would cause internal damage and possibly, if the engine freezes, there is a fire hazard. Yes, I would say it is necessary. You determine that by the loss of oil that you can see on your gauges.

Q. What was that last comment?

A. You should determine the amount of oil lost and the rapidity with which it was lost from your gauges. If the break was of serious consequence, your oil quantity would go down, and the temperature would go up; and if it was a small break, perhaps you wouldn't feather it, you would live with

(Testimony of Dudley S. Cox.)

the break. You would watch it carefully, of course.

Q. This oil cooler apparently, according to the evidence, was broken around midnight. Would you or would you not be able to see the oil cooler at night?

A. Yes, sir, with the lights that you have available to you on this airplane. You have your own flashlights, wing lights, and an Aldis lamp, which [704] is a plugged in lamp, a strong beam, a lamp about seven or eight or nine inches high, about four inches wide, a very strong and powerful light that can be plugged in the cockpit and used for such purposes, examining the outside of the airplane.

Q. Have you been able to determine whether or not Flight 324 of the 17th was flying at normal speed on four engines, and how it performed on three engines? A. Yes, sir, I have.

Q. Will you tell what your determination is?

A. Well, I took his flight plan time over the various check points, compared that with the times he was actually over the check points, and found that he was proceeding within very close tolerance of the times that he actually planned the flight, so that, therefore, the flight was proceeding normally on four engines, making good with minor exceptions the times that he planned to make good between the various check points. The only discrepancy that occurred was between Gustavus and Sitka, and there was a loss of seven minutes and he was over Sitka at 12:04, and at 12:03 he

(Testimony of Dudley S. Cox.)

had reported that he had feathered No. 1 engine, and the difficulties that might have been feathering the engine or wind accounted for this seven minutes. From there on, on three engines, he estimated he was over Sitka and southwest Annette, and he estimated his times over the next check point and made good those estimates, and that indicated [705] to me that the airplane was proceeding very normally on three engines. The speeds made good were on the longest leg of that Sitka to southwest Annette. He estimated 55 minutes, and he made that good, 55 minutes between those two check points. His original estimate on four engines was 50 minutes, so I would say that certainly indicated to me that the air plane was not in any trouble further with respect to icing or other drag that might be put on the airplane, and that it was proceeding very normally.

Q. By your remark, do you mean that there was or was not icing on the plane?

A. There may have been icing, but of no significance to slow the airplane down.

Q. Are three engine speeds slower than four engine speeds? A. Yes, sir.

Q. How much slower?

A. Generally 30 knots, perhaps. I would have to refer to power charts to be specific, but it is appreciably slower.

The Court: How many is the total number of knots speed obtained by the efficient use of four motors of the type here involved?

(Testimony of Dudley S. Cox.)

The Witness: His flight plan was about 210 knots per hour.

The Court: Losing one of the four, you lose only 30 of those 210 knots?

The Witness: Not necessarily so. It would be about roughly—in this case, I guess that would be a correct statement. About 180 knots is about the speed he made good under those conditions.

The Court: How much speed would you lose, if you know, if two of the four motors were feathered?

The Witness: Well, sir, I would have to refer to the power charts on that, but you would roughly indicate about 150 knots. I would judge that would be a good estimate.

Q. Is a DC-4 designed to operate on three engines? A. Yes, sir.

Q. What is a NOTAM?

A. That is a notice to airmen.

Q. Who issues a NOTAM?

A. The airport authorities.

Q. Are they communicated to the pilots?

A. They are put on teletype machines and available at various dispatch centers and places where pilots go to prepare their flight plans.

Q. Are they included as part of the flight plan ordinarily? A. Yes, sir, they are.

Q. Was there a NOTAM attached to the flight plan of this flight from Anchorage to Seattle?

A. No, sir, there wasn't. A NOTAM concerning Sandspit, did you say? [707]

(Testimony of Dudley S. Cox.)

Q. Any NOTAM attached to the flight plan when it departed from Anchorage.

A. I haven't got the exhibit, but I don't believe there was.

Q. Handing you the flight plan, Exhibit A-3——

A. No, sir, there is not a NOTAM sheet attached to this clearance.

Q. How is an airman ordinarily apprised of a NOTAM after the departure of his flight?

A. By radio message.

Q. Is there any indication that a NOTAM was issued to this flight? A. No, sir.

The Court: Is it possible that one was issued and that that did not disclose it?

The Witness: It is very possible, but in the local conversations between the pilot and the Sandspit radio operator, it is very likely that he was acquainted with the field conditions, but that does not appear on any record.

The Court: Is it possible some person making up that file failed, either from oversight or any other reason that could have been in his mind, to attach such NOTAM, if one existed?

The Witness: NOTAM's are normally attached to the flight plans and the clearances.

The Court: By whom are they attached? [708]

The Witness: By the dispatcher on duty.

The Court: Suppose the dispatcher on duty lost his copy and didn't have it when he was making up the file.

The Witness: They are mimeographed. There's

(Testimony of Dudley S. Cox.)

a whole file in the office of numbers of copies. It's a matter of taking one copy off and attaching that to the flight plan.

The Court: Where would this come from. What airport?

The Witness: The NOTAM's would be picked up in Anchorage when he filed his clearance and his flight plan.

Q. Would a flight proceeding non-stop according to flight plan from Anchorage to Seattle or McChord Field, would a Sandspit NOTAM be normally attached, if one existed?

A. If it were pertinent, it would probably be attached, if it existed. May I explain further that if there is no change in the facility, if the radio range is operating, if there is no change from the previous NOTAM issued, there would be no mention of it, if the conditions were apparently the same.

Q. Will you explain the categories of landing fields as they are classified by Northwest Airlines regulations?

A. There is terminal airports, alternate airports, refueling airports, emergency airports.

The Court: Southward bound, where is the next airport large enough to accommodate the landing of the plane used on Flight 324? [709]

The Witness: From Sandspit, you mean?

The Court: Yes.

The Witness: Port Hardy, then Comox.

The Court: How far is that away?

The Witness: About 215 miles.

(Testimony of Dudley S. Cox.)

The Court: Is that the nearest one next to Sandspit?

The Witness: No, sir, that is southbound. The next one east of Sandspit is Annette Island.

The Court: How far away?

The Witness: That is about 60 or 70 miles, I think.

The Court: How many minutes flight?

The Witness: On three engines, that would be about 15 or 20 minutes, about 20 minutes.

The Court: Would you be afraid to attempt that much of a flight after you had decided for some reason, no matter what, that a landing was advisable?

The Witness: Having lost one engine and decided not to land at Sandspit, would I——

The Court: No, if Sandspit was available and Annette Island was available so far as being open to landings is concerned, would it be advisable to on three engines try to make it back to Annette after you decided a landing was desirable?

The Witness: Yes, sir, it would be perfectly advisable.

The Court: Which is the better airport, if you know? [710]

The Witness: Well, sir, pilots, myself included—I see Sandspit frequently. I fly over Sandspit every day. I don't see Annette every day. I see that maybe once a year. I am well familiar with Sandspit, since I see it on regular flights. I would have to leave my route to go to Annette.

(Testimony of Dudley S. Cox.)

The Court: How far is Annette from Elmen-dorf?

The Witness: About 500 or 600 miles.

Mr. Koch: Your Honor, with regard to the Court's inquiry, the evidence will be produced within the next day or so that will show Annette was not available, it was weathered in, and so we did not have that choice that the Court is inquiring about.

Mr. Riley: Are you testifying, Mr. Koch? I think Mr. Cox can testify from the weather reports and NOTAM's in the record as to what the conditions were at that time.

The Court: What do you see from the exhibit or any information contained therein that would make any of these airports not available for landing at that time, if the plane is there ready to land?

The Witness: The weather at Annette Island was forecast to be worse than it was at Sandspit, and all other things being equal, the approach procedure at Sandspit is a little easier. You don't have the terrain to contend with that you do at Annette [711] Island. The runways at Annette are longer, but the weather there was forecast to be 1,500, occasionally 700. The weather at Sandspit was 2,000, occasionally 1,000, a difference of 300 feet.

The Court: Isn't Annette ordinarily a favored airport so far as landing planes out of bad weather is concerned? Isn't it regarded as a pretty attractive emergency landing place?

The Witness: Well, sir, I think we have had

(Testimony of Dudley S. Cox.)

just about as many airplanes in Sandspit that have been interrupted in their flight as we have Annette Island.

The Court: Was Annette built for the special purpose of accommodating these Oriental flights?

The Witness: No, sir, it wasn't. It was a military airport, originally built during the war, expanded during the war for defense purposes.

The Court: Elmendorf and Shemya are favored on this Oriental flight, is that true?

The Witness: Yes, sir. Elmendorf is a military airport, Shemya was a military airport.

The Court: Both were built as such? Both permitted the defendant to use them in these Orient flights, have they not?

The Witness: Yes, sir, at that time.

The Court: What other airfields were there available if a plane is close enough to them to use them [712] between Seattle and Elmendorf Field?

The Witness: There is an airport at Cordova, an airport at Yakutat, Yakutat, Gustavus, Port Hardy, Comox, Patricia Bay, which is Victoria, Everett, Paine Field, and Seattle-Tacoma.

Q. How was Annette Island classified, what kind of airport?

A. For our operations, it was classified as a refueling airport.

Q. How was Sandspit classified?

A. As an emergency airport.

Q. Does Northwest have the right to land at Sandspit? A. Yes, sir.

(Testimony of Dudley S. Cox.)

Q. Was it cleared to land at these other airports that you have just mentioned southbound from Sandspit? A. Was it cleared?

Q. Yes, sir.

A. It wasn't cleared to these other points.

Q. I don't mean cleared in the sense that this flight was cleared to land there, but did Northwest Airlines have the right to land at these various places? A. Yes, sir.

Q. What governs the determination as to whether to make a landing at a refueling stop or an emergency stop?

A. Well, principally it is a matter of familiarity with the airport, its facilities, the terrain surrounding the airport, the weather that you would [713] encounter, whether the approach procedure could be effected with the minimum amount of trouble and hazard to the plane and its passengers. Those questions would be in the mind of the pilot.

Q. Did any of the airports between Anchorage and Seattle have fire-fighting equipment or emergency rescue equipment?

A. There was no fire-fighting equipment or crash equipment. There was a Coast Guard station at Annette Island, where they had some facilities.

Q. On the Annette field and any other fields between Anchorage and Seattle, what fire-fighting or emergency rescue equipment existed?

A. There was no fire-fighting equipment between Anchorage and Seattle.

(Testimony of Dudley S. Cox.)

Q. Was there any emergency rescue equipment on any airfield between Anchorage and Seattle?

A. No, sir, there wasn't.

The Court: You are not excluding from your last two answers Sandspit?

The Witness: No, sir.

The Court: What you say applies to Sandspit the same as any other, does it or does it not?

The Witness: Yes, sir, that is true.

Q. Did any of these airfields have Air Sea Rescue facilities?

A. There was a Coast Guard station at [714] Annette Island. I am not sure whether that was designated as an Air Sea Rescue unit at this particular time. It was there and had been there for some time, and I couldn't quite say that it is an Air Sea Rescue. It is a Rescue Coordination Center, and I think it was concerned with both surfaces, and there was a Coast Guard surface station in that vicinity that sometimes was based at Juneau, and the harbor at Ketchikan, primarily for the purpose of fishing boats and that sort of thing, and they also had one or two aircraft. One was an amphibian, a Grumman, I believe, that was based at Annette.

Q. You mentioned facilities at Ketchikan and Juneau. Were there airports there?

A. Not at Ketchikan. There is a small airport at Juneau.

Q. Was it suitable for landing a DC-4?

(Testimony of Dudley S. Cox.)

A. No, sir. It could have been, but the airport serving Juneau is Gustavus.

Q. Should this have been taken into consideration, the availability of this Coast Guard station near Annette Island, in the pilot's making his decision where to go?

A. Not necessarily. He wasn't concerned with ditching the airplane.

Q. Turn to the page among the sheets in Plaintiffs' Exhibit 31 entitled "Emergency range procedure", is that correct?

A. That is correct, yes, sir. [715]

Q. Will you describe this extract from what has been put in evidence as a Northwest operations manual page?

A. Describe in detail the procedure?

Q. Well, I will ask you a question. Does this manual page give landing instructions and range procedure at Sandspit? A. Yes, sir, it does.

Q. How does this manual page designate the Sandspit airport?

A. Well, it designates the Sandspit airport as an emergency airport.

Q. Is this page before you an extract from the Northwest manual that was in force at the time of the accident? A. Yes, sir, it is.

Q. Is this manual issued to and in the possession of all Northwest Airlines pilots?

A. Yes, sir, it is.

Q. Now, will you describe the landing procedure specified by that manual page for Sandspit?

(Testimony of Dudley S. Cox.)

A. Well, this is a plot of the radio range with its beams extending in four directions, northeast, northwest, southeast, southwest, also a profile of the aircraft's path through the air as it makes its instrument approach at Sandspit. It states that the approach shall be made on the southeast leg of the radio range, making his procedure turn to the east at a minimum altitude of 2500 feet, crossing the radio range on his final approach at 1500 feet, [716] and on the reverse side of the page, gives the minimums applicable which the pilot has to observe. Straight in landing is 801 for day, and night 802, applicable to DC-4, B-377 aircraft.

The Court: Ask him another question.

Q. From your investigation, do you know whether or not at the time Flight 324 came in for a landing at Sandspit, what the wind conditions were?

A. From the weather observation taken at 9:30, or at 1:30, and subsequent observation taken immediately after the accident, the wind was from the southwest, I believe, around 10 or 15 miles an hour. I couldn't be exact on that.

Q. Do Northwest regulations and CAA regulations direct landings either to or into the wind?

A. Yes, sir, that is a requirement.

Q. From what position, then, would this flight have to approach the field?

A. It had to approach from north to south.

Q. What minimum altitudes had to be maintained, according to this range procedure?

(Testimony of Dudley S. Cox.)

A. He is not allowed to descend below 800 feet until he is in a position to make his approach and landings to the airport. He has to maintain that. That is his minimum under which he cannot descend until he is in a position to make his landing.

Q. Does this range procedure require or does it not require visual sighting of the field?

A. He can't descend below 800 feet unless he sees the airport plainly and can execute his landing. He must have visual observation in order to land.

Q. At what point in terms of distance from the field would the pilot be at the point where he would be 800 feet or higher from the ground and able to see the field when he came in to land?

A. He would be somewhere between—in time, you say?

Q. No, in miles.

A. He would be some place between—from two miles to five miles. I am thinking in terms of air speed, at 120 miles an hour or two miles per minute, and the descent rate that he would have to descend in order to make that good. That was the way I was basing my answer, so I would say two to six miles.

Q. From five or six miles, would he still be able to see the airport?

A. Yes, sir, he could see the airport from five or six miles, above 800 feet altitude.

Q. What if under existing conditions the visi-

(Testimony of Dudley S. Cox.)

bility was not that good, what would the pilot be required to do?

A. The pilot would have to maintain 800 feet or above until such time as he saw the airport, [718] and that would be two miles. That is his minimum.

Q. Does this range procedure chart set forth minimums in terms of distance for sighting the airport before coming in?

A. Yes, sir, it does. Two miles visibility is the minimum with which he can land there.

Q. From two miles, and at a minimum altitude of 800 feet, what type of landing would this make possible in terms of descending within the two miles or so range that the pilot would have? Is that a space enough for a gradual landing?

A. He would have to descend from two miles at 120 miles an hour. He would have to descend 800 feet a minute in order to get into the airport. That is not a long, low, dragged-out approach. It is a fairly steep angle, I'd say, at 800 feet a minute, whatever angle that might be.

Q. Would this result in a slow or a fast landing speed?

A. Landing speed—it would result in a fairly fast descent, and then flare out, and touch down would be at speeds which you would normally touch down.

Q. I can't hear you.

A. It would be a fairly steep descent, that is correct. However, the speed at which the wheels

(Testimony of Dudley S. Cox.)

get on the ground would be still at or above the normal, in the vicinity of the normal landing touchdown speeds.

Q. In your opinion, would a rather rapid [719] descent and a noticeable flare out characterize a normal landing at Sandspit at night?

A. Yes, sir, I would say it would.

Q. Is there an advantage to having the approach ceiling high and the landing at slightly above normal speed when a plane is coming in on three engines?

A. Yes, sir, I would say that would be a normal procedure.

Q. Why?

A. The pilot has to ascertain that he is not going to have to take off again and go around. It would be a precautionary move to hold a little altitude.

Q. After this accident, Mr. Cox, did Northwest Airlines conduct tests in which the conditions of this accident were simulated? A. Yes, sir.

Mr. Riley: If the Court please, at this point I will object, because I know what Mr. Cox is going to testify to, and the reports which he made, the tests he made, were contained in Plaintiffs' Exhibit 28, which was rejected because they came from the Civil Aeronautics Board file, and that test Mr. Cox made was specified in that.

(Further argument between counsel.)

The Court: The objection is sustained. You may

(Testimony of Dudley S. Cox.)

ask him what he knows about any subject that is [720] within his personal knowledge. Things that he may have done by way of making certificates or reports will not be put in, because there is no question of contradiction of some oral statement by any written report or statement. If on cross examination of this witness he had testified orally to some fact, and the plaintiff on cross examination had access to a report or an affidavit or a written statement that he made, or even an oral statement that he made on some other occasion, he could be confronted with that, and if there was any inconsistency, for the purpose only of affecting his credibility it might be receivable in evidence, but so far as this instance is concerned, the objection is sustained.

Mr. Koch: Your Honor, is it the Court's view that I have asked about a report? I have not done so, your Honor.

The Court: No, it is not. I was discussing, in a way that I had, perhaps, no justification in doing, under what circumstances such a thing might be admissible. Those circumstances are not presented here. The objection is sustained. I say to defendant's counsel, as to further action, that any exhibit or part of exhibit or part of a report which you may succeed in getting in as a part of defendant's case in chief may open up the question further of admissibility of offered exhibits which were a part of or identified as a part of plaintiffs' case in chief. [721] You may proceed.

(Testimony of Dudley S. Cox.)

Q. Mr. Cox, did you take part in the investigation and inspection of Sandspit?

A. Yes, sir, I was present at Sandspit and assisted the Civil Aeronautics Board and Department of Transport in their investigations.

Q. Did your inspection go into the problem of whether Northwest Flight 324 of the 17th had been able to accelerate properly and to reach sufficient takeoff speed? A. Yes, sir.

Q. Can you offer any further explanation of your investigation at Sandspit?

A. I examined the entire length of the runway on both sides in the snow, and the obstructions at the end, the snowbanks, were two or three feet high, and I found no tracks of any aircraft adjacent to or close to the sides of the snowbank at either side of the runway, which is about 10 feet wide or thereabouts. The runway was plowed snow and plowed inside the boundary lights, and there were no tracks close to, indicating an airplane had got close to the snow banks, nor were there any marks on the obstructions at the end of the runway indicating an airplane had taken off or dragged over those obstructions. There were no marks at all, so I concluded that no airplane in the preceding 24 to 36 hours, as far as we could [722] tell, and we checked the snow, the accumulation of snow, whether it snowed after that. It wasn't enough—you could see, discern tracks of an aircraft. We saw none. We concluded, therefore, that the airplane did accelerate properly and take

(Testimony of Dudley S. Cox.)

off properly, and that it was certainly under control. If he did not have minimum control speed, he would have run off in the snowbanks on either side, or obstructions at the end of the field, so we could only conclude it was under control, had accelerated properly, and taken off.

Q. Do I understand your testimony to be that the fact that it didn't run into the snowbanks——

The Court: I wish you would ask him.

Q. Does maintaining a directional control on a runway bear a relationship to normal acceleration?

A. Well, yes, sir. That is correct, it does bear some relation. If the plane——

The Court: That is sufficient.

Q. Do you know whether or not the plane attempted to take off from the Sandspit runway?

A. Yes, sir. He did attempt to take off. It did take off from the Sandspit runway.

Q. Do you know whether or not the plane gained air speed?

A. I concluded that it did gain air speed from the fact that it got in the air and was flying. [723]

Q. Is there a fence at the end of the runway?

A. Yes, sir. It isn't a fence, there is an obstruction consisting of a snowbank and things that they plowed off the runway and logs, a few things like that, that I judge to be three or four feet high.

Q. What end of the runway was that?

A. That was on the south end of the runway.

Q. Is that the direction in which the pilot was landing?

(Testimony of Dudley S. Cox.)

A. Yes, sir, that is the direction he was landing.

Q. Did the pilot clear that obstruction?

A. Yes, sir. We saw no marks of any aircraft in that obstruction.

The Court: Does that obstruction perform a service to the pilot taking the plane aloft from the airstrip?

The Witness: I didn't understand.

The Court: Does that obstruction just described by you serve a useful or any other purpose?

The Witness: No, sir.

Q. What is the minimum speed at which a DC-4 on three engines, loaded as this plane was loaded, must attain in order to get into the air?

A. I think about 105 knots, around 100 knots to 105 knots, somewhere in that vicinity.

Q. From your investigation, were you able to determine whether or not the pilot's decision to [724] attempt a takeoff after landing at Sandspit was a reasonable one?

A. Faced with whatever difficulties he had, it was perfectly reasonable.

Q. What do you base your judgment upon?

A. Well, that there was no particular problem. If, for instance, you land on an airport and decide that something is going to happen or does happen or influences your decision to abort the landing, you go around again, even though you are fairly close to land or have touched down. There is no reason not to expect to fly off again.

Q. What is the length of the runway?

(Testimony of Dudley S. Cox.)

A. It is 5,150 feet.

Q. What is the width between the snowbanks?

A. Well, I thought there was about 115 to 120 feet between the snowbanks.

Q. What direction was the wind blowing?

A. From the southwest.

Q. At what speed?

A. As nearly as I can recall, 10 to 15 knots.

Q. Did the pilot, in your judgment, have a decision with respect to whether or not the plane could be brought to a safe stop on the runway?

A. You are asking for my opinion?

Q. Yes.

A. In my opinion, he may have had some such [725] fear that he could not bring the airplane to a safe stop, or there must have been other difficulties. In my opinion, that was one of the factors influencing his decision to go around.

The Court: What is that factor?

The Witness: Whether he could bring the airplane to a safe stop, and I said that that was undoubtedly one of the factors that influenced his decision to go around.

The Court: What fact was there about that known to you which might have given him trouble, if any? State any fact you know of which could have been associated with his concern on that point.

The Witness: That he landed fairly far down the runway and ran along the ground, and the fact that as we stood at one end of the runway, the lights

(Testimony of Dudley S. Cox.)

on the other end of the runway were not entirely visible, and——

The Court: Why?

The Witness: There is a bulge—there is a slight elevation in the middle of the runway. The flare pots that were lighted that night could have been—he couldn't have seen all of them at the far end of the runway.

The Court: Did that obstruction you previously referred to have any part in this?

The Witness: No, sir, it didn't.

The Court: Could a plane run on the ground [726] farther without that obstruction than it could with it on this airstrip?

The Witness: Yes, sir. This obstruction is off the end of the runway, and he must be clear of the runway.

The Court: Suppose he isn't?

The Witness: Then if he hasn't attained flying speed, he will hit the thing.

The Court: If it weren't there, do you suppose there would be more or less danger of the plane being wrecked than the condition with the obstruction there?

The Witness: There is always that possibility, if there is an obstruction there you might hit it, yes.

The Court: In other words, that obstruction might conceivably cause a careful pilot to try to get the plane up more quickly, maybe too quickly

(Testimony of Dudley S. Cox.)

for the distance involved, than might otherwise be the case?

The Witness: Yes, sir, that is true.

Q. Did the snowbanks on each side of the runway, in your opinion, constitute an obstruction?

A. Under the circumstances, the closeness of the snowbanks on either side meant that he had to maintain directional control with closer tolerance than if there were no obstructions. If there were no snowbanks and he veers one way or the other, he will not hit anything; but the snowbank is there and he veers one way or the other, he is [727] going to knock the prop off or otherwise wreck the airplane, cause damage.

Q. What was the surface of the ground at the time?

A. It was snow-covered.

Q. How deep?

A. Three or four or five inches, I believe.

Q. What was the temperature?

A. It was about freezing, about 33 or 34, I believe.

Q. Would those ground conditions and the wind conditions and the snowbanks on either side of the runway be factors that the pilot would consider as far as landing, as far as bringing the plane to a safe stop is concerned?

A. Well, certainly the temperature is a factor, with a snow-covered runway, since that in effect puts a little water on top the snow, which makes braking pretty difficult. The cross wind condition means he has to exercise brake control and nose

(Testimony of Dudley S. Cox.)

wheel steering in order to maintain a directional control, and certainly the nearness of the snow-banks complicates the problem, so those are factors that certainly merit attention on the part of the pilot.

Q. Would the unbalanced power, that is, the fact there was only one engine on the left side of the plane, have anything to do with stopping the plane?

A. That would create a difference in thrust, not the same as the thrust on the other side where there [728] are two motors turning up and only one on the left side, and there is a difference in thrust between the two sides of the airplane.

Q. How could the pilot account for that difference in thrust?

A. By braking or by nose wheel steering, or by the use of other motors, either advancing the throttle or pulling the throttle off, balancing, juggling the power, in other words.

Q. With the engine missing on the left side, what braking would be involved in order to maintain directional control?

A. There would be more drag on the left side, under those conditions.

Q. So you would apply left hand or right hand brake?

A. You would apply right hand brake, since the airplane tends to go to the left, the drag set up.

Q. In view of the circumstances that confronted

(Testimony of Dudley S. Cox.)

the pilot, in your opinion, was a landing accident a probability?

A. Well, in my opinion, yes.

Q. Is a DC-4 built to take off on three engines under the weight and load that this plane had at that time?

A. Is it built for that purpose?

Q. Is it built so as to be able to do that?

A. It can be done, yes, sir.

Q. Would you classify it as an uncommon practice or as something that could reasonably be counted upon?

A. As a practice, it is uncommon. It is done. In our checking of pilots, we have them make [729] three engine takeoffs from a standing start, where they are sitting at the end of the runway. We take away one engine, don't feather the engine, leave the prop turning over, and have them take off on three engines.

Q. If the other three engines function in a normal manner, will the takeoff be safely made?

Mr. Riley: Mr. Koch has been consistently leading the witness. As long as he is helping our case, I don't mind, but it seems to me he is going too far in his leading at this point.

Mr. Koch: I am asking for this man's opinion. He is an expert by any standard the Court would impose, and this morning and yesterday Mr. Riley asked him complicated, lengthy hypothetical questions, eliciting his opinion, and with the death of all the members of the crew, we don't have any-

(Testimony of Dudley S. Cox.)

thing except the opinion of experts on certain phases.

The Court: You can establish the conditions of the question sufficiently, and then ask him if he has an opinion on it. Then ask him to state his opinion. That is all there is to it. It should be done in that fashion. Read the question.

(Last question read by reporter.)

Mr. Koch: I hadn't finished when Mr. Riley interrupted.

The Court: The objection is overruled. [730]

A. Yes, sir, in my opinion it can be safely made.

(CAR interpretations marked Defendant's Exhibit A-23 for identification.)

The Court: What is the subject or heading of that paper?

The Witness: It is CAR interpretations.

The Court: What does CAR mean?

The Witness: Civil Air Regulation.

Q. Will you identify the exhibit before you?

A. Yes, sir. This is a bulletin issued to all flight operations personnel from my office, and the subject is CAR interpretations, that is, Civil Air Regulations interpretations, and the policy concerning those interpretations.

The Court: Whose policy?

The Witness: Northwest Airlines policy.

Q. When was that dated?

A. March 16, 1951.

Q. Was that bulletin in force at the time of this accident? Was it still applicable?

(Testimony of Dudley S. Cox.)

A. Yes, sir. The bulletin was—extracts were put into various manuals. The bulletin itself was still in effect, yes, sir.

Q. Can you summarize briefly what the bulletin deals with?

The Court: What is the prominent subject matter dealt with in the bulletin? [731]

A. It actually is an attempt to elaborate and to explain the company's position with respect to the Civil Air Regulations and the observance of those regulations, as well as company regulations.

The Court: On what subjects?

The Witness: On flight operations. Perhaps if I could read——

The Court: From the point of view of passenger safety or cargo handling or what?

The Witness: From the point of view of flight operations and safety, flight safety, flight practices, which in turn is the safety of passengers and the occupants of the flights.

The Court: That is sufficient.

Q. Is one of the subjects covered by that bulletin the subject of conduct by the pilot in the case of a three engine operation, that is, losing one engine on a four engine flight?

The Court: You may look at it for a reasonable time and see what your answer should be.

A. Yes, sir. There is part of the bulletin that goes into the three engine operation.

Q. Does it set forth the interpretation by Northwest Airlines?

(Testimony of Dudley S. Cox.)

The Court: Ask him if there is any interpretation about some subject.

Q. Is there an interpretation of that, of what shall be the [732] controlling considerations of the pilot in the event of a three engine operation?

A. Yes, sir.

Mr. Koch: I will offer it in evidence, your Honor.

The Court: Did you or did you not mean in the event of an operation of a DC-3, or do you mean relating to the situation where the number of engines has been reduced to three, if you know?

The Witness: Where the four engine airplane has lost one engine or had one engine stopped.

The Court: This deals with that situation, as to the conduct of the pilot?

The Witness: Yes, sir.

The Court: Are you certain that it does deal with that subject? Will you look at it again?

The Witness: Yes, sir.

The Court: Will you state the page or other reference to that information?

The Witness: Page 4, mechanical interruptions.

The Court: That is where the subject discussion starts, does it? That is sufficient. Let opposing counsel see the material.

Mr. Riley: I can state my position, because this morning Mr. Koch objected to evidence on behalf of the plaintiff which had to do with three engine operations, [733] and Mr. Cox stated that was the only manual provision that the airline had, was

(Testimony of Dudley S. Cox.)

three engine ferry operations, and now we have this material.

The Court: It may be that if the Court receives this, it might occasion the establishment of a further basis for the admission of the document which earlier today was rejected.

Mr. Koch: Your Honor, the document which was rejected today dealt with ferry operations. This deals with what the pilot shall do when he is confronted with a situation, and deals with landings. There are regulations on landings. They are in the record. There has been testimony and exhibits put in by Mr. Riley to the effect that he must land at the nearest suitable airport and what his procedure shall be and how he shall clear with the flight superintendent. This is on the very same subject, where the company again stresses certain questions with respect to it.

The Court: The Court was inviting you to look at the place referred to by the witness.

Mr. Riley: I have, and I will withdraw my objection to the exhibit.

The Court: Defendant's Exhibit A-23 is now admitted.

(Defendant's Exhibit A-23 for identification received in evidence.)

The Court: You may read the portion of it now, or [734] you may defer that.

Mr. Koch: Would it be appropriate to suggest that that be done following the recess?

The Court: It may be done at any time, but the

(Testimony of Dudley S. Cox.)

expeditious thing would be to do it now. You are not required to do so. The Court will be at recess for about ten minutes.

(Recess.)

The Court: All are present. You may proceed.

Q. During the recess, did you have an opportunity to examine Exhibit A-23, which was introduced just prior to the recess?

A. Yes, sir, I did.

Q. What is the primary subject with which this exhibit deals? A. It deals with safety.

Mr. Koch: Your Honor, I wish to read a short portion of it, appearing on page 4.

The Court: Very well.

Mr. Koch: "Another regulation which can be used as an example in considering the matter of the interpretation of CAR's, is the one which deals with the continuation of flight with an engine out on 4-engine equipment. This rule (61.294) is as follows: 'Mechanical interruptions. In the event of any mechanical failure or interruption (including failure of engine, flight instrument, radio, or other essential component of the aircraft) which may [735] involve the safety of the flight, the pilot shall proceed to and land at the nearest place where a safe landing can be effected.' It is fundamental that 4-engine equipment is originally certified for Air Carrier Operation based on the premise that 4 engines will be in operation during the course of operation. As a safety factor, the aircraft must be proved to be able to proceed with one or two of the

(Testimony of Dudley S. Cox.)

engines inoperative. However, the ultimate safety of the flight is jeopardized the minute one of the engines becomes inoperative. Therefore, the aircraft must, when an engine is out, be landed at the nearest airport where a safe landing can be made. It is reasonable to assume that 'the nearest airport' is one which is nearest in point of time rather than miles and it is also reasonable to assume that the airport must be one which is suitable for the operation involved."

Q. This subject of landing at the nearest available airport, is it or is it not dealt with by the Civil Air Regulations? A. Yes, sir, it is.

Q. Does Part 41 apply? A. Yes, sir.

Q. Has that regulation been interpreted by the CAA? A. Yes, sir.

Q. What is that interpretation?

A. That interpretation is that the aircraft that loses one [736] engine must land at the nearest suitable airport.

Q. In the event that the pilot proceeds to destination, do the Civil Air Regulations impose some duty on the pilot? A. I'm sorry——

Q. What happens if the pilot elects to proceed to destination?

A. Then if he passes over the nearest suitable airport, then he declares an emergency and operates under his emergency authority.

Q. Do you know whether or not an explanation is then required by the CAA?

A. Yes, sir. He must justify his actions.

(Testimony of Dudley S. Cox.)

Q. Is he subject to any penalties, do you know?

A. In case justification is not satisfactory, then he is subject to disciplinary action.

Q. Had there been cases with which you are familiar and with which this problem of a pilot proceeding to destination and bypassing a suitable airport has been involved? A. Well, sir——

Q. Yes or no. A. Yes.

Q. Will you describe the situation to the Court?

Mr. Riley: I don't know what that can possibly have to do with this case.

The Court: Are you asking him to describe some regulation? [737]

Mr. Koch: No, I am asking him to describe what the CAA has done in the past and had done at the time of the accident where a pilot went on to destination instead of proceeding to the nearest suitable airport.

The Court: You have already asked him what the regulations were, and he has orally stated the regulations or interpretations, and the objection is sustained. If they have a regulation or anything that is in fact something that is circulated as an official document, you may bring that forward and mark it for identification.

Mr. Koch: It is in evidence, Part 41 of the Civil Air Regulations.

The Court: Read any part of it that pertains to the subject under inquiry at this time, or any time that may be regarded as more convenient.

Q. With respect to maintenance requirements, is

(Testimony of Dudley S. Cox.)

there any difference between scheduled flights and contract flights?

The Court: How could that be important here? You have only one of them involved, do you not? Isn't this a scheduled flight?

Mr. Koch: No, this is a contract flight, your Honor. It is scheduled under the contract.

The Court: Then the Court's statement does not apply and you may disregard it.

A. There are no differences in the maintenance requirements. [738]

Q. Under Northwest Airlines operations manual, is the pilot required to advise passengers of the fact of a three engine operation until an actual emergency is declared?

Mr. Riley: I think I should object to this line of questioning. I think the portions of the manual should be produced. That would be the best evidence.

The Court: The objection is sustained.

Mr. Koch: Your Honor, the Court permitted this very line of questioning to be conducted by Mr. Riley without producing the manual provisions.

The Court: I am not sure but what at the time he was having trouble getting from the defendant——

Mr. Koch: Not that, your Honor. It is in evidence now.

The Court: Perhaps it was not objected to. The objection is sustained.

(Testimony of Dudley S. Cox.)

Mr. Koch: Your Honor, I have the operations manual citation of paragraphs that apply.

The Court: Would you call it to the attention of opposing counsel?

Mr. Koch: It is in evidence. It is an extract from Northwest operations manual, Volume C, paragraph 30.20.40.

The Court: What is the exhibit number of what is in evidence?

Mr. Koch: It will take me a few minutes to find it.

The Court: You should know that. Do you admit that [739] it is in evidence in some exhibit?

Mr. Riley: I don't know that it is.

The Court: Desist for the present. Proceed with something else.

Q. As distinguished from a potential emergency, would an actual emergency be declared on a three engine operation?

A. No, sir, it would not, not unless complicated by other factors.

Q. Would an over water flight at night be a complicating factor under which the pilot should have invoked his actual emergency?

A. No, sir.

Q. Would inability to feather the engine be a complicating factor under which the pilot should have declared an actual emergency?

A. Yes, sir, it would be a complicating factor.

Q. When the pilot decided to land at an airport other than the point of destination, was he required

(Testimony of Dudley S. Cox.)

to notify the Northwest flight control station of the difficulty encountered? A. Yes, sir, he was.

Q. Do you know whether or not he did so?

A. Yes, sir, he did.

The Court: Do you know of any — if so, state what you know—of any complicating factors here in the action of this pilot in attempting to land this plane at Sandspit? [740]

A. I know of no complicating factors, sir.

The Court: Have you any comment to make on what a normal, usual and ordinary competent pilot would have in mind before he makes such a landing?

The Witness: No, sir. I think that any reasonable, competent pilot so qualified, with his experience, would have done exactly the same thing, gone into Sandspit.

The Court: He may have had some reason, according to your testimony, as I understand it, for landing other than the feathered engine, is that what you wish to say?

The Witness: Yes, sir.

The Court: Do you know what the reason was?

The Witness: He was required to do so by regulation.

Mr. Koch: Your Honor, I think that there is a misunderstanding. Perhaps I didn't make clear my question.

Q. In case of loss of an engine in flight on a four-engine aircraft, what is the pilot required to do?

(Testimony of Dudley S. Cox.)

A. He is required to land at the nearest suitable airport.

The Court: Whether there are any complications or not, is that what you mean to say? Is that what you understand the regulations to require?

The Witness: Yes, sir, that is what I understand the regulations to require.

Q. Did you or did you not testify that the loss of that engine constitutes a potential emergency?

A. I did so testify.

Q. As distinguished from a potential emergency, when would an actual emergency be declared?

The Court: If you know. Normally, by reasonably competent and careful pilots.

A. An actual emergency is an immediate cause of concern, an immediate grave danger, immediate hazard that confronts the pilot, that——

The Court: That is sufficient.

Q. Would that immediate problem or danger confronting the pilot in all cases, in your opinion, involve something more than a mere loss of an engine?

A. It would involve more than just the loss of an engine.

Q. Is the pilot required to notify passengers of an unscheduled landing? A. Yes, sir.

Q. Do you know whether or not he did so?

A. Yes, sir, he did so.

Q. In declaring an actual emergency, whose decision is that?

A. That rests with the captain of the flight.

(Testimony of Dudley S. Cox.)

Q. It is discretionary with him?

A. It is discretionary with the captain of the flight.

Q. How is a three engine landing classified by the Northwest manual?

A. Well, it is the same applicable principles as with a four [742] engine landing.

Q. Is it a normal or an abnormal landing?

A. Well, there are no undue precautions other than the normal precautions that you would have with one engine out. In other words, the airplane lands completely satisfactory on three engines. There is nothing unusual in the landing operation of the aircraft on three engines.

Q. Is the Northwest operations manual and other manuals promulgated by Northwest Airlines, do they require approval, part by part, by the Civil Aeronautics Administration?

A. The flight operations manuals, yes, they do.

Q. Do you know whether or not the sections in effect January 19, 1952, had been so approved?

A. Yes, sir, I am sure that they were.

Q. Were you in charge of the crew training program of Northwest Airlines at the time of this flight?

A. Yes, sir.

Q. Do your records indicate whether or not the pilot and co-pilot were duly certified and licensed?

A. Yes, sir, they do.

Q. Were they?

A. They were duly certified and qualified.

Q. Do your records indicate whether or not the

(Testimony of Dudley S. Cox.)

pilot, co-pilot and stewardess had completed training prescribed by the Northwest Airlines and CAA regulations? [743]

Mr. Riley: Objection. That is not the best evidence. They can produce the records and the people that compiled them.

Mr. Koch: I am going to do that. I asked him whether he has such information.

The Court: The objection is overruled as to this question, but as to what the information was, that might be another thing.

A. Yes, sir, they do.

Q. Do these papers and records show the experience, employment history and results of physical examinations of the pilot?

A. Yes, sir, they do.

Q. Does it set forth a fitness report?

A. Yes, I think that it does.

The Court: Why spend this time? All you need to do is bring them forward.

Mr. Koch: Exhibit A-8 from the pre-trial order, also A-9, A-10 and A-11.

The Court: I wish to give them new numbers, beginning with Defendant's Exhibit A-24.

(Record of John Pfaffinger marked Defendant's Exhibit A-24 for identification.)

Mr. Riley: Plaintiffs will not object to A-24.

The Court: Do you offer it in evidence?

Mr. Koch: I do, your Honor. [744]

The Court: It is admitted.

(Testimony of Dudley S. Cox.)

(Defendant's Exhibit A-24 for identification received in evidence.)

The Court: Can you give it a name which you think opposing counsel will not object to that reasonably reflects the nature of its information or contents?

Mr. Koch: It is the history and training and experience of the pilot, Pfaffinger.

The Court: Proceed. Ask him questions.

Q. What is the exhibit you have before you?

The Court: What kind of information does it contain?

The Witness: It contains the training——

The Court: Whose training?

The Witness: Captain Pfaffinger's training.

The Court: Is it a record of his pilot training?

The Witness: It is a record of his schooling by Northwest Airlines after his employment as captain, giving dates, number of hours and subjects that he took.

The Court: Pilot school training?

The Witness: Yes, sir, and flight training.

The Court: The record of pilot school training of who?

The Witness: Captain Pfaffinger.

Q. Does this pilot history show that the pilot was qualified over the Seattle to Anchorage run?

Mr. Riley: I object to the testimony. I would like [745] to ask the witness a couple of questions about the exhibit. I don't believe he is qualified to testify as to what it shows.

(Testimony of Dudley S. Cox.)

The Court: Do you object to this question?

Mr. Riley: I object to the question because I think it can be shown he didn't prepare them. It is a self-serving declaration from the company, a memorandum to Mr. Cox. Mr. Cox did not prepare the records or conduct the training.

Mr. Koch: He has agreed the exhibit might be admitted.

The Court: I will ask you to read the exhibit. Never mind having someone interpret it.

Mr. Koch: It is lengthy.

The Court: Read the part that is important.

(Defendant's Exhibit A-24 read by Mr. Koch.)

(Pilot history of Kenneth Kuhn marked Defendant's Exhibit A-25 for identification.)

(NWA Interoffice communication marked Defendant's Exhibit A-26 for identification.)

(Manuals assignment marked Defendant's Exhibit A-27 for identification.)

(Statement of flights marked Defendant's Exhibit A-28 for identification.)

Q. Will you state what you have before you?

A. This is the outline of pilot history of Kenneth Kuhn, co-pilot. [746]

The Court: Referring to Defendant's Exhibit A-25?

The Witness: Yes, sir, Defendant's Exhibit A-25, outline of pilot history of Kenneth H. Kuhn.

Q. Are there attachments also relating to co-pilot Kuhn? A. Yes, sir.



